No. 02-165-CFX Title: Richard A. Borgner, et al., Petitioners
v.
Florida Board of Dentistry, et al.

Docketed: August 2, 2002 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 29 2002	Petition for writ of certiorari filed. (Response due September 1, 2002)
	Aug 28 2002	Waiver of right of respondents Florida Board of Dentistry, et al. to respond filed.
	Aug 30 2002	Brief amicus curiae of American Board of Implantology/Implant Dentistry filed.
	Sep 3 2002	Brief amicus curiae of American Academy of Cosmetic Dentistry, Inc. filed.
	Sep 4 2002	DISTRIBUTED for Conference of September 30, 2002
	Sep 16 2002	Response requested.
	Oct 18 2002	Brief of respondent Florida Board of Dentistry in opposition filed.
	Oct 29 2002	Reply brief of petitioners Richard A. Borgner, et al. filed.
	Oct 30 2002	REDISTRIBUTED for Conference of November 15, 2002
	Nov 22 2002	REDISTRIBUTED for Conference of November 27, 2002
	Dec 2 2002	REDISTRIBUTED for Conference of December 6, 2002
	Dec 9 2002	Petition DENIED. Justice Thomas filed a dissenting opinion, joined by Justice Ginsburg. (Detached opinion.)

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Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY,
AND JOHN O. AGWUNOBI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

FRANK R. RECKER
NANCY A. SCHELL
FRANK R. RECKER & ASSOCIATES, CO., L.P.A.
267 N. Collier Blvd.
Suite 202
Marco Island, FL 34145
(239) 642-4704

MARILYN J. MARSHALL
254 East Sixth Ave.
TALLAHASSEE, FL 32303
(850) 561-0707

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
41 South High Street
Suite 1900
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

QUESTION PRESENTED

Whether Florida's prohibition of truthful and nonmisleading advertising by dentists regarding their professional credentials and membership in national dental organizations, save when the advertisement provides in state-scripted and "capital letters" that the organizations are "not" "bona fide," violates the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

All parties currently in the proceeding are listed in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Background 1

B. Florida's Regulation of Implant Dentistry Advertising 3

C. Proceedings Below 6

REASONS FOR GRANTING THE WRIT 11

I. The Lower Court Erred 12

A. The Decision Is Inconsistent With The Bedrock Presumption That Governments May Not Tell Individuals What To Say And When To Say It 12

B. The Court's Commercial-Speech Cases Do Not Presumptively Permit Scripted Disclaimers 14

C. Florida's Scripted Disclaimer Fails To Satisfy These Requirements 18

TABLE OF CONTENTS (cont.)

Page

II. The Eleventh Circuit's Decision Is One Among Many Lower-Court Decisions Reflecting The Mistaken View That The First Amendment Presumptively Permits Disclaimer Requirements 23

III. The Lower Court Erred On A Matter Of Great Public Importance 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 19, 20, 27

Ardt v. Ill. Dep't of Prof'l Regulation, 607 N.E.2d 1226 (Ill. 1992) 24

Bates v. State Bar of Ariz., 433 U.S. 350 (1977) 14

Bingham v. Hamilton, 100 F. Supp. 2d 1233 (E.D. Cal. 2000) 24

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) 16, 26

Borgner v. Cook, 33 F. Supp. 2d 1327 (N.D. Fla. 1998) . 1,4

Cantwell v. Connecticut, 310 U.S. 296 (1940) 13

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) ..... *passim*

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 20, 23, 27

Douglas v. State, 921 S.W.2d 180 (Tenn. 1996) 22

Edenfield v. Fane, 507 U.S. 761 (1993) 17, 19

Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) 20

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 27

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 13

Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994) ..... *passim*

Iowa Supreme Court v. Kirlin, 570 N.W.2d 643 (Iowa 1997) 23

Lawyer Disciplinary Bd. v. Allen, 479 S.E.2d 317 (W. Va. 1996) 24

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) .. 27

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 13

TABLE OF AUTHORITIES (cont.)

Page

Cases

Miss. Bar v. Attorney R.,
649 So. 2d 820 (Miss. 1995) 23
Moore v. Cal. State Bd. of Accountancy,
831 P.2d 798 (Cal. 1992) 23
Parker v. Ky. Bd. of Dentistry,
818 F.2d 504 (6th Cir. 1987) 24
Parmley v. Mo. Dental Bd.,
719 S.W.2d 745 (Mo. 1986) 23, 25
Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) ..... *passim*
In re R.M.J., 455 U.S. 191 (1982) 12, 15
Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988) 13
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) .. 20, 27
Simm v. La. State Bd. of Dentistry, No. 01-2608,
2002 WL 63538 (E.D. La. Jan. 16, 2002) 24
Appeal of Sutfin, 693 A.2d 73 (N.H. 1997) 24
Texans Against Censorship, Inc. v. State Bar,
888 F. Supp. 1328 (E.D. Tex. 1995) 23
Thompson v. W. States Med. Ctr., 122 S. Ct. 1497 (2002) 26
Tsatsos v. Zollar, 943 F. Supp. 945 (N.D. Ill. 1996) 24
Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 14
Walker v. Bd. of Prof'l Responsibility,
38 S.W.3d 540 (Tenn. 2001) 23
W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 13
Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) .. *passim*

TABLE OF AUTHORITIES (cont.)

Page

Constitutional Provisions and Statutes

U.S. Const. amend. I 1, 12
U.S. Const. amend. XIV 1, 12
28 U.S.C. § 1254(1) 1
Fla. Stat. § 466.019 ..... 3, 5
Fla. Stat. § 466.028(1)(d)(1994) 3
Fla. Stat. § 466.0282 (1996) 3
Fla. Stat. § 466.0282 ..... *passim*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 284 F.3d 1204, and the opinion of the district court (Pet. App. 25a-45a) is reported at 152 F. Supp. 2d 1317. The district court decision in the initial proceeding (Pet. App. 46a-58a) is reported at 33 F. Supp. 2d 1327.

JURISDICTION

On March 6, 2002, the court of appeals issued its decision on the merits in this case. On April 30, 2002, the court of appeals denied petitioners' motion for rehearing and suggestion for rehearing en banc. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The challenged Florida statutory provision, § 466.0282, is set out at Pet. App 59a-61a.

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

A. Background

Dr. Richard A. Borgner is licensed to practice dentistry in the State of Florida. He practices general dentistry in St. Petersburg with an emphasis on implant dentistry, and has been doing so for 28 years. Throughout his career, Dr. Borgner has been a member in good standing with the state-licensing board, the Florida Board of Dentistry.

Implant dentists have expertise in replacing defective teeth. They do so by inserting implant devices into the jaw that allow artificial teeth to attach to the bones that once connected the patient's natural teeth. Any dentist who has a general license to practice dentistry in Florida may practice implant dentistry in the State. Accordingly, no specific training or education beyond that required to obtain a general dentistry license is required. Pet. App. 26a.

The American Academy of Implant Dentistry (AAID) has supported the field of implant dentistry for over 50 years. AAID's "primary purpose . . . is the enhancement of its members' knowledge, skill, and expertise in the field of implant dentistry." Pet. App. 2a. To these ends, members of the organization may earn credentials in the field of implant dentistry—the "Associate Fellow" and "Fellow" designations—by completing numerous educational, training and practice requirements.

To become an Associate Fellow, the dentist must (1) complete 300 hours of continuing education in implant dentistry, including 150 hours of clinical implant education, (2) pass a written examination, and (3) successfully complete an oral/clinical treatment case examination. Pet. App. 26a. To become a Fellow, the dentist must (1) have five years of experience in implant dentistry, (2) complete 100 hours of continuing education in implant dentistry (above and beyond the 300 hours required for the Associate Fellow credential), (3) provide dental implant treatment in 50 cases, (4) pass an oral examination, and (5) satisfactorily present 10 cases to the AAID's Admissions and Credential Board. *Id.* at 26a-27a. All told, AAID has roughly 2200 members, about 550 of whom have earned Associate Fellow or Fellow status. *Id.* at 27a. Dr. Borgner is both an Associate Fellow and a Fellow of AAID.

AAID also sponsors a certifying board, the American Board of Oral Implantology/Implant Dentistry (ABOI/ID)

which issues the Diplomate or Board-Certified credential. Dentists may earn this credential by passing ABOI/ID's certification examination and by fulfilling certain educational and practice requirements. *Id.* ABOI/ID began issuing these credentials in 1989, and roughly 200 dentists (including Dr. Borgner) have received the designation since then. *Id.*

B. Florida's Regulation of Implant Dentistry Advertising.

Until recently, Florida law regulated dental advertising in this area by prohibiting false, deceptive, or misleading advertising. Fla. Stat. §§ 466.019, 466.028(1)(d) (1994). In applying that standard, the Florida Dental Board ("the Board") in 1994 specifically permitted dentists to advertise credentials issued by AAID. In doing so, they observed that the advertising was both truthful and non-misleading. Board of Dentistry Order 94-01DS, August 11, 1994 ("BOD 94-01DS"). "[A]lthough Implant Dentistry is not a specialty area recognized by the American Dental Association or the Board," the Board determined that "'the AAID and the ABOI/ID are bona fide organizations that credential dentists in the area of implant dentistry.'" Pet. App. 48a (quoting BOD 94-01DS).

In 1996, the Florida legislature suddenly altered this policy. It enacted legislation prohibiting dentists from advertising membership in, or any expertise established by, organizations not recognized or accredited by the American Dental Association ("ADA") in the nine ADA-recognized "specialty" areas of dentistry. Fla. Stat. § 466.0282 (1996). In enacting this legislation, neither the legislature nor the Board made any findings or other determinations that the advertising of AAID credentials or the listing of implant dentistry amounted to anything less than truthful, non-deceptive advertising. Nor did the legislature or Board prepare any study showing that the prior general

standard—prohibiting false, deceptive or misleading advertising—had failed properly to regulate this area.

In 1997, Dr. Borgner and AAID challenged the new legislation on First Amendment grounds in the Northern District of Florida. The district court held that the statute violated plaintiffs' free-speech rights because it prohibited dentists from providing truthful, non-misleading information to the public about membership in, and credentials from, the AAID, as well as certification by the ABOI/ID. *Borgner v. Cook*, 33 F. Supp. 2d 1327, 1333 (N.D. Fla. 1998) ("*Borgner I*"). *See* Pet. App. 46a. The State did not appeal.

In 1999, less than a year after the court's decision, the Florida legislature attempted to modify the law. At the same time that it purported to lift the ban, however, the legislature imposed conditions on advertising that had the same effect. Borrowing a page from *Animal Farm*, the legislature allowed Dr. Borgner to advertise his membership in and credentials from AAID but only on the condition that the advertisement announce in "capital letters" or their equivalent that the association was not a "bona fide" accrediting organization according to the Florida Dental Board and that implant dentistry was not one of nine specialties that the Board officially recognizes.

More specifically, the new law, which is reprinted in full at Appendix A, works as follows. Under the law, Dr. Borgner may advertise a "practice emphasis" in implant dentistry, but not without including a proviso in any such advertisement, whether it be a business card, Yellow Pages insert or his letterhead. Fla. Stat. § 466.0282(3). The state-prescribed language says:

> IMPLANT DENTISTRY IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

Id. In like manner, if Dr. Borgner wishes to "acknowledge or otherwise reference" his AAID credentials in the announcement, he must add a second disclaimer:

> THE AMERICAN ACADEMY OF IMPLANT DENTISTRY IS NOT RECOGNIZED AS A *BONA FIDE* SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

Id. (emphasis added). Both "statements" must appear "in capital letters or some other manner clearly distinguishable from the rest of the announcement, solicitation, or advertisement." Fla. Stat. § 466.0282(3).

In enacting the new law, as in enacting the earlier one, the legislature did not make any findings that the advertising of AAID credentials or the listing of implant dentistry amounted to anything less than truthful advertising. The legislature did not explain why the general prohibition against false, deceptive or misleading advertising—which is still in existence, Fla. Stat. § 466.019 (2002)—did not suffice to address these issues. And it did not find that AAID or ABOI/ID were illegitimate organizations or ones that indiscriminately issued credentials. Despite this barren evidentiary record, the statute concludes with a statement that the legislature "finds that this process for the recognition of dental specialties and other bona fide areas of dental practice is the least restrictive means available to ensure that consumers are not misled about a dentist's unique credentials." Fla. Stat. § 466.0282(4).

Not surprisingly, since the passage of this speech code, Florida citizens have heard no more about implant dentistry in general or the AAID in particular than they did after the initial speech ban. Neither Dr. Borgner nor any other dentist in Florida (so far as the record shows) has chosen to advertise his or her expertise in this manner. And if Dr. Borgner ultimately loses this case, one can fairly ask whether anyone ever will

publicly promote an affiliation with these once-officially "bona fide" national dental organizations and now officially non-"bona fide" organizations.

C. Proceedings Below.

In the face of these conditions on his speech and with the recognition that the new law did indirectly what the initial law did directly, Dr. Borgner returned to court. Along with his co-plaintiff, AAID, Dr. Borgner claimed that the new legislation also violated his First (and Fourteenth) Amendment rights. In doing so, he named as defendants the Secretary of the Florida Department of Health, who is currently John O. Agwunobi, the Florida Board of Dentistry, and the members of the Board of Dentistry. While the Florida Attorney General represented the Board in the first action, he chose in the second action to "notif[y] Defendants that his office was declining to otherwise defend the case." Pet. App. 26a n.1. The district court ultimately ruled the same way it had in *Borgner I* and granted plaintiffs' motion for summary judgment.

The court started by setting forth the four-part commercial-speech test announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Pet. App. 32a (quoting *Central Hudson*). As an initial matter, the court concluded that Dr. Borgner's speech was protected because it was truthful and not "'inherently' misleading." Pet.

App. 32a. It therefore determined that the State "bear[s] the substantial burden of demonstrating that the restrictions placed on a dentist's speech" satisfy the remaining elements of the *Central Hudson* test—which is to say that they "both target an identifiable harm and mitigate against such harm in a direct and effective manner." *Id.*at 36a.

In concluding that the State had not met this burden, the court observed that it had produced little evidence to support the speech restriction. "Defendants have produced no evidence," the court noted, "to suggest

> [1] that implant dentistry is an illegitimate or unrecognized area of dental practice,
>
> [2] that either the AAID or the ABOI/ID is a sham organization,
>
> [3] that either organization awards credentials or certifications indiscriminately based upon something other than objectively verifiable criteria,
>
> [4] that anyone has complained to the Board about being misled, deceived or confused by an advertisement that includes information regarding a dentist's membership in and/or credentials from the AAID or the ABOI/ID, or
>
> [5] that anyone has complained about a dentist who—like Dr. Borgner—has advertised his credentials in these organizations."

Id. at 37a.

Instead of establishing any of these potential factual predicates for the regulation, the court added, the record showed just the opposite. Most notably, the record showed that the Dental Board determined in 1994 that AAID members could advertise their status as fellows of the AAID and diplomates of the ABOI/ID. And in that ruling, the Board determined "as a finding of fact that 'the AAID and ABOI/ID are bona fide organizations'" that permissibly credential

dentists in this area. *Id.* (quoting Board's order). "[N]othing in" that order, the court noted, said anything "to suggest that advertisement of a dentist's credentials in the AAID and/or the ABOI/ID might be misleading to the public." *Id.*

Having failed to provide any evidence that would support the legislation and having conceded that the membership of Dr. Borgner in these organizations, together with "the predicate requirements for" his credentials in these bodies, were "verifiable facts," the State turned to two telephone surveys. The first was a two-week 1998 survey prepared in connection with the earlier (and unconstitutional) legislation, and the second was a similar 2002 survey "commissioned by the Board for purposes of this litigation" to show that the advertisement was potentially misleading. *Id.* at 38a. The trial court found, however, that "[n]either survey assessed what, if any, harm would result from permitting a dentist to advertise either a practice emphasis in implant dentistry or membership in and credentials received from the AAID or ABOI/ID." *Id.* at 41a. Put another way, the court concluded that the surveys may "suggest that dentists who advertise 'certification' and/or 'specialization' may have a competitive edge over dentists who do not so advertise." *Id.* at 43a. But, importantly, they do "not establish that any such competitive edge is unmerited." *Id.* In the end, the court determined that the telephone surveys do not establish that the statute "targets a genuine threat of harm and/or furthers substantial state interests in a direct and effective manner." *Id.* at 44a.

In a 2-1 decision, the Eleventh Circuit reversed. The majority agreed that the advertising was not in fact misleading or deceptive, and accordingly was eligible for First Amendment protection under the first prong of *Central Hudson*. *Id.* at 8a. As to the second prong, the majority concluded that Florida had a "substantial" governmental interest in the speech restriction due to the State's interest in "'protecting its citizens from unqualified and incompetent health care professionals.'" *Id.* at 9a (citation omitted).

In addressing the third prong—whether the statute "advances the Government's interest in a direct and material way," *id.* (quotation omitted)—the majority relied on the two studies presented by the State. In its view, the studies "demonstrated the actual harm that could come from Borgner's proposed advertisements that do not include disclaimers." *Id.* at 13a. "Without a disclaimer," the majority added, "consumers are led into thinking implant dentistry is a state-recognized specialty and that AAID and ABOI enjoy state approval, when in reality, they do not. The state has also shown that its disclaimer requirements will alleviate this harm because providing disclaimers will help consumers make better, more informed decisions about whom they select as their general or specialized dentist." *Id.* at 13a-14a.

Lastly, the court concluded that the speech restriction was "no more extensive than necessary to serve the state's interest." *Id.* at 14a. Relying on *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the majority concluded that "[c]ourts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech." Pet App. 14a. Nor did the majority believe that *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), altered this conclusion, even though that decision invalidated a disclaimer requirement because the State (there, too, Florida) failed to demonstrate the harm in advertising professional credentials and because the disclaimer required by the State was unduly burdensome. In the majority's view, the surveys in this case made *Ibanez* "distinguishable," as did the nature of the disclaimer requirements, which were not "especially long or burdensome" but were "simply an effective manner to convey necessary information to the public." Pet. App. 17a.

Judge Hill dissented, concluding that the State had not satisfied the third or fourth prongs of *Central Hudson*. "It is

clearly not enough," the dissent explained, "for the Board to identify some way—*any* way—in which Dr. Borgner's advertisements might confuse." *Id.* at 22a. Rather, there must be some "harm" in fact. And because the State conceded that Dr. Borgner's certifying organizations were not sham operations, the only "harm" identified here was that the "potential consumer confusion of the AAID credential with state certification" might create a "'competitive edge'" for the advertising dentist. *Id.* at 23a. That did not suffice since the alleged purpose of the statute was not to protect one group of dentists over another, but to protect consumers. *Id.*

The dissent also concluded that the State failed to meet its burden of showing that the regulation is no more extensive than necessary. In its view, the requirement that Dr. Borgner recite in capital letters that AAID is not recognized as a "bona fide" specialty accrediting organization by the ADA or the Florida Board of Dentistry may well lead a consumer to "conclude that the AAID is a bogus organization or diploma mill." *Id.* at 24a. Concluding that "this confusion" was "at least as likely as the confusion that AAID is a state-sponsored organization," the dissent determined that the law could not meet the fourth prong of *Central Hudson*. *Id.*

REASONS FOR GRANTING THE WRIT

As is often the case when governments use speech restrictions to address a policy issue, the Florida statutory cure is worse than the disease. Ordinarily a challenge to the following type of law would pose the most basic of First Amendment questions:

> General rule—individual may not publicly announce her association with, or credentials from, a national organization.
>
> Exception to rule—individual may provide this information to the public but only if she simultaneously acknowledges in capital letters that the organization is "NOT RECOGNIZED AS A BONA FIDE" one by the State.

What converts this seemingly straightforward question into a potentially knotty one is the setting—that Dr. Borgner wishes to make a professional and commercial point rather than a political one. But even if truthful speech about legitimate organizations deserves less protection when it arises in connection with an individual's efforts to earn a living, this kind of scripted disclaimer does not deserve the respect it received below.

The source of the lower court's error was the view that the First Amendment presumptively permits disclaimer requirements in the context of commercial speech. Because this Court has stated in *dicta* on several occasions that commercial-speech disclaimers are preferable to speech bans and because the Court in one instance upheld a disclaimer requirement, a growing number of lower courts (including the Eleventh Circuit here) have given exceedingly relaxed scrutiny to commercial-speech disclaimers. That trend culminated in this case where the lower court upheld a disclaimer requirement based on the bookend explanations

that it is preferable to a speech ban and that it will prevent advertisements from being potentially misleading.

Not only does this result far exceed the limited authority that this Court has given States to impose speech disclaimers, but the very nature of these explanations proves the need for further guidance in this area. Even on their own terms, these explanations do not suffice to justify this law either as a matter of logic or common sense. The exceedingly high costs that this disclaimer imposes on the would-be speaker make it no different in effect from a categorical ban on speech. And the confessional tone of the disclaimer is far more likely to confuse consumers than to educate them.

The Court has not considered the appropriate boundaries of a disclaimer requirement since 1994 in its decision in *Ibanez*. And in each of the cases addressing the issue—*Ibanez*, *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer*—the Court has not been asked to explain the requisite findings necessary to impose such restrictions or to specify the correct means/end fit necessary to sustain state-scripted disclaimers. Because the resulting absence of guidance has generated confusion in the lower courts and because this issue sits at the sensitive crossroads between an individual's right to choose what to say and when to say it and society's right to compel an individual to speak in order to regulate misleading speech, the question deserves the Court's time and attention. This case presents an ideal vehicle for doing so.

I. The Lower Court Erred.

A. The Decision Is Inconsistent With The Bedrock Presumption That Governments May Not Tell Individuals What To Say And When To Say It.

In initially prohibiting the National Government from restricting the speech of individuals, *see* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech") and in later prohibiting the States from doing the same, *see id.* U.S. Const. amend XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Constitution does not distinguish between government regulations that ban speech and government regulations that compel it. By its terms, the Constitution protects "freedom of speech," a phrase "necessarily comprising the decision of both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988).

Consistent with these words, the Court has long given equal, if not greater, First Amendment protection to government regulations that compel speech. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," *id.* at 795, and "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-91. The National Government and the States accordingly may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" or do what comes to the same thing—"force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, in *Barnette*, the Court said that "involuntary affirmation" and other forms of compelled speech "could be commanded only on *even more immediate and urgent grounds* than silence." 319 U.S. at 633 (emphasis added). *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 581 (1995) ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not

justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

Under these free-speech first principles, there can be little doubt that a law scripting this kind of disclaimer—in conspicuous "capital letters" and with a "not" "bona fide" proviso—would fail to withstand any traditional form of First Amendment scrutiny. Plainly, such a government-imposed speech code could not be, and would not be, sustained.

B. The Court's Commercial-Speech Cases Do Not Presumptively Permit Scripted Disclaimers.

While the Court has treated disclaimers differently in the commercial-speech setting, it has not forsaken these principles entirely. And, most importantly, the Court has never presumptively endorsed government-scripted and government-compelled disclaimers of this sort—as a brief review of the Court's decisions illustrates.

From the earliest commercial-speech cases to the more recent, the Court has frequently mentioned informational disclaimers but has only specifically upheld them in one instance. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976), in initially marking the boundaries of commercial-speech protection and in striking a ban on the advertisement of prescription-drug prices, the Court acknowledged that commercial speech could be required to include "additional information, warnings, and disclaimers" but only to the extent they "are necessary to prevent its being deceptive." One year later, *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977), invalidated restrictions on attorney advertising and said generally (and again in *dicta)* that "the preferred remedy" in the context of commercial-speech regulations "is more disclosure, rather than less." In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), in striking restrictions on public utility

advertising, the Court stated that disclosure requirements may present an acceptable less-restrictive alternative to the suppression of speech. 447 U.S. at 565. And in *In re R.M.J.*, 455 U.S. 191 (1982), in preventing a state bar from prohibiting an attorney from advertising "Admitted to Practice Before THE UNITED STATES SUPREME COURT," the Court noted that the State had not attempted a less restrictive regulation, such as "requir[ing] a statement explaining the nature of the Supreme Court Bar." *Id.* at 206.

Not until *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), did the Court specifically uphold a disclosure requirement. At issue was a requirement that attorneys who advertise their willingness to work on a contingent-fee basis explain the nature of the fee.

> In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

471 U.S. at 650. While the Ohio requirement upheld in *Zauderer* thus compelled attorneys to explain more fully how a contingency-fee arrangement works, the State did not script the disclaimer, did not require the attorney to put the disclaimer in capital letters and did not require the attorney to say that the fee arrangement was "not" "bona fide."

Since *Zauderer* the Court has twice considered State efforts to restrict advertisements regarding professional credentials issued by private national organizations and in each instance has invalidated the law. In *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the Court addressed an attorney advertisement providing that the lawyer was a "Certified Civil Trial

Specialist By the National Board of Trial Advocacy." It held that the advertisement was neither actually nor inherently misleading, and accordingly could not be prohibited from being aired. *Id.* at 106, 110 (plurality); *id.* at 111 (Marshall, J., joined by Brennan, J., concurring in judgment). "We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television." *Id.* at 105 (plurality) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983)). In its view, the "average consumer . . . can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what, if any, value to accord this information." *Id.* at 105 n.13. Indeed, the disclosure of this designation "both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys." *Id.* at 111. Because the case involved a complete ban, however, the Court concluded that it was not necessary "to consider when a State might impose some disclosure requirements, rather than a total prohibition, in order to minimize the possibility that a reader will misunderstand the significance of a statement of fact that is protected by the First Amendment." *Id.* at 110 n.17.

Most recently, *Ibanez* addressed the use of a CFP (certified financial planner) designation by an attorney in her yellow pages listing, on her business card and on her office stationery. In Florida's view, "the words used in the designation—particularly, the word 'certified'—so closely resemble 'the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists.'" 512 U.S. at 144 (citation omitted). The Court disagreed, holding that the State had "not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." *Id.* at 138-39.

In reaching this initial conclusion, the Court offered three rationales, all applicable here. One, "[g]iven the complete absence of any evidence of deception, the Board's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Id.* at 145 (quotation omitted). Two, any risk of confusion or potential deception is removed by the consumer's ability to "verify Ibanez' CFP credential"—either by calling the CFP Board of Standards, just as the consumer in *Peel* could call the National Board of Trial Advocacy, or by asking Ibanez herself about the meaning of the certification. *Id.* at 145 n.9. Three, the State offered no evidence "that any member of the public has been misled by the use of the CFP designation." *Id.* at 145 n.10.

Nor was the Court persuaded by the State's alternative contention that the CFP designation was "potentially misleading," thereby allowing it prophylactically to impose a disclaimer requirement that the "recognizing agency is not affiliated with or sanctioned by the state or federal government" and requiring the advertiser to set forth the recognizing agency's requirements for recognition. *Id.* at 146. For one, the Court said, "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 146 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). For another, the State had not "point[ed] to any harm that is potentially real, not purely hypothetical." *Id.* For still another, the "detail required in the disclaimer . . . effectively rules out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id.* at 146-47. Lastly, the case did not "fall within the caveat noted in *Peel* covering certifications" issued by sham organizations or those that "issued certificates indiscriminately for a price." *Id.* at 148.

C. Florida's Scripted Disclaimer Fails To Satisfy These Requirements.

Whether one measures the Florida disclaimer requirement by traditional free-speech principles or by *Central Hudson*, it is flatly unconstitutional. No satisfactory evidentiary explanation for this compelled speech has been established, and it is plainly more restrictive than necessary to further the State's interest in protecting consumers.

Florida, to begin with, may not take advantage of two safe harbors in this area. Throughout this litigation, the State has conceded that Dr. Borgner's proposed advertisements are truthful and non-misleading. He does have an expertise in implant dentistry; he is an Associate Fellow and Fellow of AAID; and he is a Diplomate of ABOI/ID.

Nor has the State ever argued that these are sham organizations that "fall within the caveat noted in *Peel* covering certifications" issued "indiscriminately for a price." *Ibanez*, 512 U.S. at 148. Even though the Eleventh Circuit concluded that the State's interest in this speech restriction stemmed from its desire to "protect[] its citizens from unqualified and incompetent health care professionals," Pet. App.9a, no lower court has ever suggested and the State has never maintained that these organizations are anything less than legitimate. Indeed, one of the respondents, the Florida Board of Dentistry, has never altered its 1994 conclusions that these are "bona fide" organizations and that advertisements regarding them are not misleading. Confirming this conclusion, ABOI/ID has issued fewer than 200 "Diplomate" certificates since 1989 to dentists nationwide who have met its requirements. Pet. App. 27a. And the requirements for obtaining these credentials and the AAID credentials are anything but casual. They require extensive education, training, clinical experience, and oral and written examinations, all of which are objectively verifiable. Pet. App. 26a-27a.

In the face of these truths, the Eleventh Circuit fell back on the claim that Dr. Borgner's interest in explaining his credentials and expertise is "potentially misleading" or "potentially harmful." But as the Court has explained, "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez*, 512 U.S. at 146 (quoting *Edenfield*, 507 U.S. at 771). That is exactly what happened here. The State failed to establish one shred of relevant evidence showing a risk of actual harm before enacting the law. There was no evidence of prior complaints about these credentials in general or about Dr. Borgner in particular. And there was no evidence of actual confusion about this expertise, about the dentists who have this expertise, or about these particular credentials. Indeed, the only State evidence of record cuts exactly in the opposite direction. The Florida Dental Board's 1994 finding on this precise issue said that the advertisement of these same credentials was not misleading. Pet. App. 37a.

In reaching a different conclusion, the Eleventh Circuit majority relied on the 1998 telephone survey prepared in connection with the first litigation (and concerning an unconstitutional law) and on the 2000 telephone survey prepared in connection with this litigation (and prepared after the law was enacted). In concluding that this "evidence" satisfied *Central Hudson's* third prong, the Eleventh Circuit has utterly diluted this requirement and in the process fueled criticism of the *Central Hudson* test itself. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in the judgment) (no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech'"); *id.* at 517 (Scalia, J., concurring in the judgment) ("shar[ing] Justice Thomas's discomfort with the *Central Hudson* test," which he found "to have nothing more than policy intuition to support

it"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in the judgment) ("The Court's continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34 & n.1 (1993) (Blackmun, J., concurring in the judgment) (intermediate scrutiny is appropriate only where commercial speech involves "false statements of fact" or "advocat[es] illegal activities").

First, in relying on surveys prepared in connection with the litigation, the Eleventh Circuit relied on just one case from this Court—*Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Notably, however, that case involved a two-year study prepared *before* and *in connection with* the passage of a restriction on direct-mail attorney solicitations of individuals within 30 days of an accident. *Id.* at 620, 626. Reliance on the extensive evidence in that case—summarized in a 106-page study— to justify this permanent advertising restriction, where no "member of the public has been misled by the use of the [AAID] designation," *Ibanez*, 512 U.S. at 145 n.10, gives analogy a bad name.

Second, Florida 's two surveys do not support the only legitimate end identified by the Eleventh Circuit below, namely to "protect[] [Florida 's] citizens from unqualified and incompetent health care professionals." Pet. App. 9a. Because neither survey in any way suggests, let alone shows, that these organizations are illegitimate, neither one can plausibly support this objective of the restriction.

Third, the Florida study here in no way explains why this kind of scripted disclaimer is necessary. It is one thing to show that the mention of AAID credentials may lead the average dental consumer to assume that AAID is a state-sponsored organization, which presumably is a risk posed by every private state or national credentialing organization. But it is quite another to show that the only effective remedy for

this alleged harm is a scripted disclaimer that the organization is not "bona fide." The two surveys do not even begin to support that kind of requirement, and never answer the more pedestrian question raised by this issue. Why not trust the consumer to call AAID, look at its web site, or call the ADA or Florida Dental Board to learn more about the significance of its credentials and those of ABOI/ID? That is what the Court has required in other cases. Any risk of confusion or potential deception along these lines, *Ibanez* teaches, is removed by the consumer's ability to "verify Ibanez' CFP credential"—either by calling the CFP Board of Standards, just as the consumer in *Peel* could call the National Board of Trial Advocacy, or by asking Ibanez herself about the meaning of the certification. *Ibanez*, 512 U.S. at 145 n.9. *See Peel*, 496 U.S. at 102-03 (plurality) ("there is no evidence that the consumers . . . are misled if they do not inform themselves of the precise standards under which claims of certification are allowed"). Because Florida thus has not "point[ed] to any harm that is potentially real, not purely hypothetical," *Ibanez*, 512 U.S. at 146, it cannot satisfy *Central Hudson*'s third prong.

Matters do not improve when one considers the test's fourth prong—whether the speech suppression is "more extensive than is necessary." *Central Hudson*, 447 U.S. at 566. Not only do the two litigation-driven telephone surveys fail to explain why the capitalized not-bona-fide disclaimer is necessary, but no legitimate survey ever could justify such an exacting requirement. The capitalized nature of the disclaimer (or its conspicuous equivalent) does nothing to support Florida's only proffered justification for this restriction—to protect the public from incompetent dentists. Likewise these requirements hardly advance the only other conceivable justification for the restriction—that the State wishes to ensure that credentialed members of AAID are not put in a misleadingly superior position relative to their counterparts in the dental profession. Of course, the required exclamation of

the non-state-accredited message does just the opposite. It serves to make the playing field exceedingly unequal.

In addition, the "detail required in the disclaimer . . . effectively rules out notation of the [AAID] designation on a business card or letterhead, or in a yellow pages listing." *Ibanez*, 512 U.S. at 146-47. As a practical matter, no dentist could plausibly include the State-sponsored script in most customary advertisements. Nor was the State without alternatives. It could have established a mechanism for reviewing non-specialty credentials to distinguish sham accrediting organizations from legitimate ones. Or it could have simply required the advertiser to give the AAID's address or phone number, or for that matter the ADA's. As *Peel* observed, at any rate, the "average consumer . . . can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what, if any, value to accord this information." 496 U.S. at 105 n.13 (plurality). This designation "both serves the public interest and encourages the development and utilization of meritorious certification programs for [professionals]." *Id.* at 111 (Marshall, J., joined by Brennan, J., concurring in the judgment).

Add to this the content of the scripted disclaimer—that AAID is "NOT" a "BONA FIDE" organization—and it becomes clear that the legislative policy behind this law does just what the First Amendment proscribes. It first prohibits the advertiser from communicating truthful information however he or she wishes; it then conditions any speech on the topic on the advertiser's willingness to pay the price of embracing the State's script for communication in this area; and it lastly involves a script confessing that the advertiser's credential is not "bona fide" or literally not given by a "good faith" organization. If this is narrow tailoring, then the concept has lost all meaning. In both real terms and practical terms, this is a speech ban, pure and simple.

II. The Eleventh Circuit's Decision Is One Among Many Lower-Court Decisions Reflecting The Mistaken View That The First Amendment Presumptively Permits Disclaimer Requirements.

Nor is the Eleventh Circuit alone in reading this Court's cases to say that disclaimers are presumptively constitutional in commercial-speech cases. Court after court has embraced the view that disclaimers (even State-scripted disclaimers) represent a safe harbor in regulating the speech of professional and other commercial advertisers.

Numerous decisions, for example, stand for the general proposition that disclaimers will be upheld. *See, e.g.*, *Walker v. Bd. of Prof'l Responsibility*, 38 S.W.3d 540, 548 (Tenn. 2001) (upholding disclaimer requirement for advertisement of specialization not recognized by the Tennessee Commission on Continuing Legal Education and Specialization); *Iowa Supreme Court v. Kirlin*, 570 N.W.2d 643, 644-46 (Iowa 1997) (upholding disclaimer requirement for advertisement of professional credentials in legal organizations); *Douglas v. State*, 921 S.W.2d 180, 186-87 (Tenn. 1996) (upholding disclaimer requirement for advertisement of specialty services provided by general dentists); *Miss. Bar v. Attorney R.*, 649 So. 2d 820, 824 (Miss. 1995) (upholding disclaimer requirement for advertisement of practice areas); *Moore v. Cal. State Bd. of Accountancy*, 831 P.2d 798, 813 (Cal. 1992) (upholding disclaimer requirement for advertisement that uses the term "accountant"); *Parmley v. Mo. Dental Bd.*, 719 S.W.2d 745, 752 (Mo. 1986) (upholding disclaimer requirement for advertisement of certification by organization not recognized by the American Dental Association).

District court decisions are to similar effect. *See, e.g.*, *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1355 (E.D. Tex. 1995) (upholding disclaimer requirement for advertisements of certifications not granted by the Texas Board of Legal Specialization), *aff'd*, 100 F.3d 953

(5th Cir. 1996) (upublished table decision); *Simm v. La. State Bd. of Dentistry*, No. 01-2608, 2002 WL 63538, at *6 (E.D. La. Jan. 16, 2002) (concluding that *Zauderer* generally permits disclaimers but not speech bans).

Just as numerous decisions indicate that disclaimers are generally permitted, others hold that outright advertising bans generally are not permitted. *See, e.g., Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 332 (W. Va. 1996) (striking ban on advertising specialization); *Ardt v. Ill. Dep't of Prof'l Regulation*, 607 N.E.2d 1226, 1232 (1992) (striking ban on advertising "family dentistry"); *Tsatsos v. Zollar*, 943 F. Supp. 945, 951 (N.D. Ill. 1996) (striking ban on advertising of affiliation by podiatrists with a national certifying organization).

And several decisions combine these strands of analysis by striking a ban and maintaining in *dicta* that a disclaimer requirement would be permitted. *See, e.g., Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 510 (6th Cir. 1987) (striking ban on advertising of a dentist's authorization to perform a particular dental procedure because the dentist was in fact permitted to perform the procedure) ("It is equally evident that these terms and the information they convey can be presented in a way which does not mislead the public into believing that a general practicing dentist is a dentist with an orthodontia specialty license. A disclaimer to such an effect would adequately address the state's concern."); *Appeal of Sutfin*, 693 A.2d 73, 76 (N.H. 1997) (striking sanctions against dentist because speech ban restricted truthful speech, but suggesting that a disclaimer requirement would be valid) ("The Supreme Court's decisions in this area reflect a preference for regulations that impose lesser burdens on speech, such as disclosure requirements, as opposed to outright suppression"); *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1240 (E.D. Cal. 2000) (striking dentistry ban on advertising credentials with AAID because "AAID is a bona fide organization, and it actually issues credentials according

to certain published standards," but stating that disclaimer requirement would be constitutional).

Typical of the scrutiny of these disclaimer requirements is the Missouri Supreme Court's analysis, which is exceedingly forgiving and which mistakenly concludes that *Zauderer* embraces this presumption in favor of all manner of disclaimers. "The disclaimer of section 332.321.2(14)(f)," that court concluded, "rather readily may be found constitutionally sufficient; appellant has only a minimal protected interest in 'not providing . . . particular factual information.'" *Parmley v. Missouri Dental Board*, 719 S.W.2d 745, 752 (Mo. 1986) (quoting *Zauderer*, 105 S. Ct. at 2282).

III. The Lower Court Erred On A Matter Of Great Public Importance.

Against the backdrop of these lower-court decisions, it is well to remember that the developing lower-court perspective that compelled silence is generally barred while compelled speech (*e.g.*, a disclaimer) is generally permitted has no foundation in the holdings of this Court. No First Amendment decision of the Court, whether in the commercial-speech arena or any other, has endorsed the kind of far-reaching regulation of the freedom of speech that Florida has imposed.

Certainly the only holding of the Court permitting a disclaimer—*Zauderer*—does not do so. Recall that it merely established that lawyers advertising contingency fee arrangements needed to explain in their own words that the client would be responsible for some (if not all) of the costs of the litigation. But that was because the advertisement in that instance *was misleading* as written, not because it had the ineffable quality of possibly being misleading in some settings and with some people. For the same reason that the Court has never "reduce[d] the adult population . . . to reading only what is fit for children" in other (more difficult) commercial-speech

settings, *Bolger v. Young Drug. Prods. Corp.*, 463 U.S. 60, 73 (1983) (quotation omitted) (striking law prohibiting the mailing of unsolicited advertisements for contraceptives), the Court has never upheld disclaimer requirements merely because someone—anyone—might be confused by the information. The presumption in favor of disclaimers, as *Zauderer* indicates, applies not to any compelled-speech requirement but only to settings in which the regulated speech *is* itself misleading. In that setting, however, the speech receives no First Amendment protection at all, *Central Hudson*, 447 U.S. at 566, and it is only the inclusion of the additional information that makes the advertisement not misleading and thereafter a form of protected speech. Here, of course, the advertisement was not misleading as written. In the words of *Zauderer* itself, such "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force." 471 U.S. at 648-49.

Nor did the law in *Zauderer* have the added First Amendment indignity of scripting the disclaimer or, worse, of requiring the lawyer to indicate that contingency-fee arrangements were "not" "bona fide" according to the State Bar. To say that *Zauderer* permits and indeed respects such verbal goose-stepping necessarily slights the decision and the First Amendment as well.

In the eight years since the Court last reviewed the commercial-speech boundaries of disclaimer requirements in *Ibanez*, the lower courts have failed correctly to ascertain the line between permissible disclaimer requirements and impermissible restraints on truthful speech. Yet, throughout this period of time, the Court has been steadfast in making clear that commercial-speech restrictions represent a policy choice of "last resort," not "first resort." *Thompson v. W. States Med. Center*, 122 S. Ct. 1497, 1507 (2002). Yet no serious assessment of the history of this legislation could plausibly reach the conclusion that Florida chose this option

as a law of "last resort." And in one case after another, the Court has invalidated similar efforts to restrict commercial speech as an option of "first resort." *See, e.g., id.; Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Despite this drum beat of decisions reminding governments that they may not casually restrict the advertising of truthful, non-misleading information, the lower courts continue to treat the advertisement of professional credentials as a form of second-class speech. And this case well illustrates the trend. Not only were these disclaimer requirements treated as presumptively legitimate, but they were allowed even though their transparent effect was to ban protected speech. If two of the four Article III judges who reviewed this law could reach these conclusions and do so on the basis of Supreme Court precedent, it would seem that the time has come to provide additional guidance to the lower courts about the line between valid and invalid disclaimers as well as the requisite findings needed to sustain them.

CONCLUSION

The petition should be granted.

Respectfully submitted,

FRANK R. RECKER
NANCY A. SCHELL
FRANK R. RECKER & ASSOCIATES, CO., L.P.A.
267 N. Collier Blvd.
Suite 202
Marco Island, FL 34145
(239) 642-4704

MARILYN J. MARSHALL
254 East Sixth Ave.
TALLAHASSEE, FL 32303
(850) 561-0707

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
41 South High Street
Suite 1900
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

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APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Richard A. BORGNER,
American Academy of Implant Dentistry,
Plaintiffs-Appellees,
v.
Robert G. BROOKS,
Florida Board of Dentistry,
Defendants-Appellants.

No. 01-12098.

March 6, 2002.

Before WILSON, HILL and FAY, Circuit Judges.

WILSON, Circuit Judge:

This case presents an issue of first impression: whether the disclosure provision of Florida Statutes section 466.0282, which requires Florida-licensed dentists to include disclaimers when advertising specialty areas not recognized by the state and when advertising credentials from non-state approved credentialing organizations, places an unconstitutional ban on commercial speech. The district court found that it does, and granted summary judgment in favor of Dr. Richard A. Borgner, D.D.S., and the American Academy of Implant Dentistry (AAID) on their challenge to the statute's constitutionality. After reviewing section 466.0282 under the test articulated in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), we find this statute to be constitutional under the First Amendment and reverse the summary judgment.

BACKGROUND

Borgner is a Florida-licensed dentist who practices general dentistry with an emphasis in implant dentistry in St. Petersburg, Florida.[1] In light of his specialty, Borgner advertises himself as a member of the AAID, a Fellow of the AAID, and a Diplomate of the AAID's certifying board, the American Board of Oral Implantology/Implant Dentistry (ABOI/ID). The AAID is a national dental organization whose members may earn credentials—specifically, Associate Fellow and Fellow—in the field of implant dentistry. The organization's primary purpose, goal and objective is the enhancement of its members' knowledge, skill, and expertise in the field of implant dentistry. Implant dentistry and the organizations affiliated with this specialty, however, are not recognized by the American Dental Association (ADA) or the Florida Board of Dentistry (the Board).[2]

Prior to 1998, section 466.0282 prohibited Florida-licensed dentists from advertising a specialty practice, which included implant dentistry. This prohibition led Borgner to challenge the constitutionality of this statute, as it applied to implant dentistry. The district court found the statute unconstitutional to the extent that it banned all advertising of affiliation with or certification by non-ADA recognized dental organizations. *Borgner v. Cook*, 33 F. Supp. 2d 1327, 1333 (N.D. Fla. 1998) (*Borgner I*). At the urging of the Board, the Florida legislature amended section

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[1] Implant dentistry is explained by the AAID in *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1234 (E.D. Cal. 2000), as "the placing of devices for attaching artificial replacement teeth to the same bones to which natural teeth are anchored."

[2] The special areas of dental practice currently recognized by the ADA are: dental public health, endodontics, oral and maxillofacial pathology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, and prosthodontics.

466.0282, adding in pertinent part a provision that allows Florida-licensed dentists to advertise a specialty practice or credential accredited by a bona fide credentialing organization other than the ADA or the Board, but requires that the advertisement disclose that the indicated specialty or credentialing organization is not state-approved. Borgner, again, brought an action challenging the statute and again prevailed. Specifically, the district court granted summary judgment in favor of Borgner and the AAID, and declared section 466.0282 unconstitutional to the extent it prohibits Borgner from advertising membership in the AAID and his status in the AAID and ABOI/ID and to the extent that it prohibits him from representing to the public that his practice is limited to implant dentistry without also incorporating a disclosure statement.

DISCUSSION

We review summary judgments de novo, applying the same standards as the district court and reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Parks v. City of Warner Robins*, 43 F.3d 609, 612-13 (11th Cir. 1995); *Warren v. Crawford*, 927 F.2d 559, 561-62 (11th Cir. 1991). Whether state restrictions on commercial speech are constitutional is an issue subject to de novo review. *Mason v. Fla. Bar*, 208 F.3d 952, 955 (11th Cir. 2000).

Before analyzing section 466.0282 under the *Central Hudson* test, we must first determine whether the statute, taken as a whole, is clear as far as what is required and what is prohibited. *EEOC v. Total Sys. Serv., Inc.*, 240 F.3d 899, 904 (11th Cir. 2001)(Edmondson, J., concurring); *St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 967 (Fla. 2000) (per curiam) ("[A] statute must be construed in its entirety...."); *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 84 (Fla. 2000) ("[A]ll parts of a statute must be read together in order to achieve a consistent whole," and "[w]here possible,

courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another."). After reading section 466.0282 in its entirety, and taking into account all of its four subsections, we find the statute's meaning to be plain and unambiguous on its face.

Subsection (1) of the statute lists the necessary prerequisites for a dentist to hold himself out as a specialist or as a member of an organization that recognizes the specialty: the dentist must have completed a specialty education program approved by the American Dental Association (ADA), and this specialty must be recognized by the ADA.[3] Subsection (2) explains how dentists can still represent to the public that their practice is limited to a specific area of dentistry if their specialty is not authorized under subsection (1): the dentist must have attained membership in or attained credentials from an accrediting organization that is approved by either the Board or the ADA as a bona fide organization for such an area of dental practice (in order to receive Board or ADA approval, the organization must require dentists to meet several

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[3] (1) A dentist licensed under this chapter may not hold himself or herself out as a specialist, or advertise membership in or specialty recognition by an accrediting organization, unless the dentist:

(a) Has completed a specialty education program approved by the American Dental Association and the Commission on Dental Accreditation and:

1. Is eligible for examination by a national specialty board recognized by the American Dental Association; or

2. Is a diplomate of a national specialty board recognized by the American Dental Association; or

(b) Has continuously held himself or herself out as a specialist since December 31, 1964, in a specialty recognized by the American Dental Association.

Fla. Stat. § 466.0282(1).

conditions).[4] If a dentist's specialty does not fit into subsection (1), and if a dentist is not a member or lacks credentials in an organization under subsection (2), then subsection (3) applies. Subsection (3) allows dentists to advertise their practice emphasis, despite the lack of ADA recognition, if they include a disclaimer explaining that this specialty is not recognized by the ADA or the Board. Moreover, if the dentist wishes to advertise membership in a specialty organization not approved by the ADA or the Board, then the dentist may also advertise membership in this organization (or the credentials he/she has received in this organization) if the dentist includes a disclaimer explaining

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[4] (2) A dentist licensed under this chapter may not represent to the public without appropriate disclosure that his or her practice is limited to a specific area of dentistry other than a specialty area of dentistry authorized under subsection (1), unless the dentist has attained membership in or has otherwise been credentialed by an accrediting organization which is recognized by the board as a bona fide organization for such an area of dental practice. In order to be recognized by the board as a bona fide accrediting organization for a specific area of dental practice other than a specialty area of dentistry authorized under subsection (1), the organization must condition membership or credentialing of its members upon all of the following:

(a) Successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is:

1. Beyond the dental degree;

2. At the graduate or postgraduate level; and

3. Of at least 12 months in duration.

(b) Prior didactic training and clinical experience in the specific area of dentistry which is greater than that of other dentists.

(c) Successful completion of oral and written examinations based on psychometric principles.

Fla. Stat. § 466.0282(2).

this organization is not recognized as a bona fide specialty accrediting organization by the ADA or the Board.[5]

Finally, subsection (4) explains the purpose behind the statute: the Florida Legislature does not want the public to be misled regarding the specialization and particular credentials of dentists. The Legislature wants the public to be informed that some dental specialties and some organizations recognizing these specialties are not sanctioned by the ADA or the Board. The Legislature finds including disclosure statements in these particular advertisements is the least restrictive means available to ensure consumers will not be misled.[6]

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[5] (3) Notwithstanding the requirements of subsections (1) and (2), a dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the board may announce a practice emphasis in any other area of dental practice if the dentist incorporates in capital letters or some other manner clearly distinguishable from the rest of the announcement, solicitation, or advertisement the following statement: "... (NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) ... IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY." If such an area of dental practice is officially recognized by an organization which the dentist desires to acknowledge or otherwise reference in the dentist's announcement, solicitation, or advertisement, the same announcement, solicitation, or advertisement shall also state prominently: "... (NAME OF REFERENCED ORGANIZATION) ... IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."

Fla. Stat. § 466.0282(3).

[6] (4) The purpose of this section is to prevent a dentist from advertising without appropriate disclosure membership in an organization which may be perceived by the public as recognizing or accrediting specialization or other unique competencies in an area of dentistry that is not recognized or accredited by the American Dental Association or the board in accordance with this section. The purpose of this section is also to prohibit a dentist from advertising a specialty or other area of dental practice without appropriate disclosure unless the special competencies held by the dentist satisfy the requirements of subsection (1) or subsection (2). The Legislature finds that dental consumers can reasonably rely on these requirements as satisfactory evidence of a dentist's attainment of meaningful competencies in the specialty or other bona fide areas of dental practice advertised. The Legislature also finds that this process for the recognition of dental specialties and other bona fide areas of dental practice is the least restrictive means available to ensure that consumers are not misled about a dentist's unique credentials. Fla. Stat. § 466.0282(4).

Therefore, after examining the statute in its entirety, we find section 466.0282 does not completely ban advertising of membership or credentials in the AAID and ABOI, as the district court order suggests. Subsection (3), when read in conjunction with subsections (1) and (2), clearly permits advertisement of an implant dentistry specialty and/or AAID and ABOI membership and credentials so long as these statements are accompanied by the appropriate disclaimers. Keeping this statutory construction in mind, we must now decide whether the disclaimer requirement in subsection (3) imposes an unconstitutional burden on Borgner's First Amendment rights.

In *Central Hudson*, the Supreme Court established that while commercial speech enjoys some First Amendment protection, the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U.S. at 563. Since the First Amendment is concerned only with "the informational function of advertising," state regulations of commercial messages that do not accurately inform the public about lawful activity are valid. *Id.* The standard used in evaluating the constitutionality of government restrictions on commercial speech comes from *Central Hudson*, which set out a four-step process for assessing the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether [3] the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than necessary to serve that interest.

Id. at 566. Our review of the summary judgment will focus on whether the court properly applied the *Central Hudson* test.

With respect to the first prong of the test, the Supreme Court has, even prior to *Central Hudson*, drawn a distinction between "potentially" and "inherently" misleading advertising. *In re R.M.J.*, 455 U.S. 191 (1982); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Inherently misleading or false advertising is not considered commercial speech, and may be regulated by the state at will. *In re R.M.J.*, 455 U.S. at 203. However, advertising that is only potentially misleading cannot be restricted unless the other three prongs of the *Central Hudson* test are met. *See Mason*, 208 F.3d at 955. In the instant case, the Board concedes that the relevant expression, Borgner's proposed advertisement, is only potentially misleading advertising, and is thus commercial speech subject to the latter three prongs of the *Central Hudson* test.

The second prong of the *Central Hudson* test requires the government to articulate a "substantial" interest in regulating Borgner's advertisement. *Central Hudson*, 447 U.S. at 566. The Board argues that the state has an interest in regulating the dental profession, and in establishing uniform standards for certification, and to that end, the state also has an interest in ensuring that dentists' advertisements are not misleading to consumers with respect to those standards. Courts have

previously noted that the state has a general interest in regulating the professions, and that "they have broad power to establish standards for licensing practitioners." *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 625 (1995). This interest carries with it a responsibility to ensure that professional advertisements do not mislead consumers about which practitioners enjoy state approval and recognition. Therefore, Florida's desire to regulate dentists' advertisements due to its interest in "protecting its citizens from unqualified and incompetent health care professionals" is certainly valid, and thereby satisfies the second prong of the *Central Hudson* test. *Strang v. Satz*, 884 F. Supp. 504, 508 (S.D. Fla. 1995).

The third part of the *Central Hudson* test has been described as its "penultimate prong." *Mason*, 208 F.3d at 956. This portion of the test requires the government to "demonstrate that the challenged regulation advances the Government's interest in a direct and material way." *Fla. Bar*, 515 U.S. at 625. That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). The district court held that the Board could not meet this burden in the instant case, because it could not show any "identifiable harm" that would come from Borgner's proposed advertisement.

Courts have generally required the state to present tangible evidence that the commercial speech in question is misleading and harmful to consumers before they will find that restrictions on such speech satisfy *Central Hudson*'s third prong. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 147 (1994) (striking down a state regulation for failure to back up the concern that the speech would mislead rather than inform); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108-09 (1990)

(rejecting the claim that certain speech was misleading for lack of empirical evidence). The Board argues it has presented tangible evidence in the form of two telephone surveys to demonstrate that the restriction on Borgner's advertising directly addresses an actual harm—specifically, that consumers would think Borgner's credentials were recognized by the state, a misleading assumption that the regulation in question is designed to rectify.

Survey data is certainly one way to prove the existence of an identifiable harm. *Fla. Bar*, 515 U.S. at 626-28; *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1240 (E.D. Cal. 2000). If the survey results fairly show that the public is likely to assume that those advertising a dental "specialty" are in fact certified by the state in that specialty, the Board has a credible case that its regulation targets an actual harm, the harm of potentially misleading advertisements.[7]

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[7] The district court found the Board's survey results unpersuasive. In finding no "identifiable harm" would come from Borgner's advertisement, the district court seemed to emphasize that the Board had not demonstrated that AAID and ABOI were "sham organizations" or were somehow illegitimate. This does not seem to be a relevant issue; the fact is, those organizations are not recognized by the ADA or the state of Florida, regardless of their legitimacy or standards.

The state has a substantial interest in regulating the dental profession and setting certain standards a dentist or organization must meet to enjoy state recognition. Irrespective of whether the organization is legitimate or a sham organization/diploma mill, if the organization does not meet certain state standards, then the organization will not enjoy state recognition as bona fide. The AAID is not being singled out—it simply does not meet state requirements under § 466.0282(2) and therefore, a disclaimer must be included in the advertisement.

The actual harm in this case is that consumers will be led into thinking that implant dentistry and the AAID/ABOI meet state standards for recognition, when in fact, they do not. It is not our place to question the Board's standards—AAID and ABOI, for whatever reasons, do not meet the Board's standards for recognition. Consumers believing that these organizations do meet state standards are being misled, and that is the harm the disclaimer requirement seeks to redress.

Of the two surveys conducted by the Board, we find the 2000 Study of Florida Residents Regarding Attitudes about the State of Florida's Role in Certifying Dental Specialists to be the most persuasive. The survey results, compiled from 500 completed interviews, found that nearly two-thirds (63.8%) of the survey respondents believe that dentists who advertise as being "certified by a board as a specialist in a particular area" (i.e., advertise as being certified by the AAID in implant dentistry) have been directly or indirectly certified by the State of Florida.[8]

Nearly three-fifths (57.6%) of survey respondents believe that a dentist who advertises as being a "specialist in a particular area" (i.e., advertise as being a specialist in implant dentistry) or (57.0%) "having his/her practice limited to a certain area" (i.e., advertise as having his/her practice limited to implant dentistry) has been either directly or indirectly certified by the State of Florida.[9] Moreover, 68.2% of the survey respondents who had visited a specialist are more

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[8] Those respondents who believe that dentists who advertise as being certified by a board as a specialist in a particular area have been either directly or indirectly certified by the State of Florida assume that these dentists have the following qualifications: 97.8% believed the dentist had graduated from an accredited dental school, 97.2% believed the dentist had advance training, 95.1% believed the dentist passed a specialty exam, 83.4% believed the dentist was required a minimum number of years experience to practice as a specialist, and 96.2% believed the dentist was required to take continuous education.

[9] Those respondents who believe that the state has either directly or indirectly certified the dentist as a specialist assume that certain qualifications have been met: 98.1% believed the dentist had graduated from an accredited dental school, 96.8% believed the dentist had advance training, 94.1% believed the dentist passed a specialty exam, 83.8% believed the dentist was required a minimum number of years experience to practice as a specialist, and 93.3% believed the dentist was required to take continuous education.

likely to believe that dentists who advertise as being board certified have the approval of a Florida state agency or a national organization.

These survey results suggest that a majority of consumers are misled into thinking that a dentist who advertises as being certified by the AAID or who advertises as being a specialist of implant dentistry are somehow sanctioned by the State of Florida.

The 1998 Study of Florida Residents Regarding Dentists and Dental Specialists is less significant than the 2000 survey. However, it does reveal how important ADA certification of a dentist and his/her practice area is to the public. Composed of 1000 completed interviews, the survey was designed to determine whether lay persons would be drawn to dentists who advertise themselves as certified or as specialists by the ADA or by another organization that has not been recognized as an acceptable credentialing organization by the ADA.

According to the affidavit of Kenneth D. Wald, who has a doctorate in political science and is an expert in survey research, the survey clearly demonstrates that respondents rely heavily on the approval of the ADA in evaluating both general and specialized dentists. Eighty-one percent of all survey respondents indicated that they were more likely to visit a dentist if they knew the dentist was certified by the ADA. And, over 80% indicated they would have more confidence in a dentist's ability if they knew the dentist was certified by the ADA, and 79% indicated they would be more willing to trust a dentist that they knew was ADA certified.

Also, in selecting dentists to perform implantation, certification by the ADA was the major reason for selection following either personal or professional recommendation. Knowing that an implant specialist was certified as a specialist by an ADA approved board was either "Very" or "Somewhat" important to more than 79.2% of respondents. In fact, 81.3%

were more likely to visit a dentist certified as a specialist by the ADA.

These two surveys, taken together, support two contentions: (1) that a substantial portion of the public is misled by AAID and implant dentistry advertisements that do not explain that AAID approval does not mean ADA or Board approval; and (2) that ADA certification is an important factor in choosing a dentist/specialist in a particular practice area for a large portion of the public. From these survey results, it is clear that many consumers find it difficult to make a distinction between AAID and ADA certification, and many consumers find ADA certification of a general or specialized dentist to be extremely important. They are thus misled by advertisements like Borgner's, which suggest to them that implant dentistry is an ADA approved specialty or that the AAID is a bona fide accrediting organization. Furthermore, this confusion concerns an issue that is relevant and compelling to a large proportion of consumers. Therefore, the Florida government is justified in regulating commercial speech in this area in such a way that information (i.e., disclaimers in advertisements) is quickly available to consumers so that they might be able to make an informed decision in selecting a dental professional.

Thus, through these surveys, the state has demonstrated the actual harm that could come from Borgner's proposed advertisements that do not include disclaimers. Without a disclaimer, consumers are led into thinking implant dentistry is a state-recognized specialty and that AAID and ABOI enjoy state approval, when in reality, they do not. The state has also shown that its disclaimer requirements will alleviate this harm because providing disclaimers will help consumers make better, more informed decisions about whom they select as their general or specialized dentist.

The fourth prong of *Central Hudson* requires an examination of "the relationship between the [state's] interests

and the means chosen to serve them." *Fla. Bar*, 515 U.S. at 632. We do not require that the regulation at issue be the least restrictive means available to accomplish the state's objective. Rather, we merely require "a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

We find the disclaimer requirements in the current section 466.0282, compared to the previous outright prohibitions on advertising discussed in *Borgner I*,[10] to be no more extensive than necessary to serve the state's interest in "protecting its citizens from unqualified and incompetent health care professionals," and establishing standards and uniform criteria for the certification of its licensed dentists. *Strang*, 884 F. Supp. at 508.

Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Peel*, 496 U.S. at 110-11; *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992); *Bingham*, 100 F. Supp. 2d at 1241. According to the Court in *Zauderer*, since "disclosure requirements trench much more narrowly on

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[10] The previous *Borgner I* statute prohibited Florida licensed dentists from advertising any membership in, or specialty recognition by, an accrediting organization that is not recognized or accredited by the ADA. The district court in *Borgner I* found that this categorically ban could not survive constitutional review. 33 F. Supp. 2d at 1331-32. The Legislature then amended the statute so that the state no longer categorically prohibits this advertising, but now permits this advertising with the additional request that a dentist add a disclaimer to the advertisement if certain ADA/Board requirements are not met.

an advertiser's interests than do flat prohibitions on speech, warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception." 471 U.S. at 651. In order to show that a disclaimer is disproportionate to the end the government seeks, a plaintiff needs to show that it is "unduly burdensome." *Id.* The *Zauderer* Court found the disclaimer provision in the Ohio disciplinary rule requiring attorneys to include a disclosure explaining the distinction between legal fees and legal costs to not be unduly burdensome: "we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers." *Id.*

The same rationale underpins our decision in *Abramson*. In *Abramson*, we held that the Florida legislature could not prohibit an unlicensed person from holding himself out or advertising as a psychologist when Florida law does not require that such person be licensed to practice psychology. 949 F.2d at 1578. However, we also suggested that a disclaimer would be a constitutional alternative, one which is less restrictive, yet sufficient to cure the potential deception and ultimately serving the state's interest. *Id.* at 1577 ("To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information").

In *Peel*, the Supreme Court held that Illinois could not completely ban lawyers from holding themselves out as certified or as a specialist (i.e., advertising certification by the National Board of Trial Advocacy (NBTA)) because these statements were not actually or inherently misleading. 496 U.S. at 110. However, because the Court found disclosure, such as full disclosure regarding specialty certifications like the NBTA, to be of interest to the public and would also "encourage the development and utilization of meritorious certification programs for attorneys," the Court suggested the

state require a disclaimer with any attorney advertisement that mentions certification. *Id.* at 110, 111 ("To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.").

In the same vein, the district court in *Bingham* found that the California State Board of Dental Examiners's enforcement policy, which prohibits licensed dentists from advertising certain credentials, such as the AAID, to be unconstitutional because the Dental Board "failed to show that a total prohibition is necessary." 100 F. Supp. 2d at 1240. However, the court indicated that the Dental Board's concern "could be addressed by requiring disclosure in the advertisement that the AAID is not recognized by the Dental Board or the ADA" or "by requiring the advertisement to summarize the requirements for certification." *Id.* at 1241.

Lastly, Borgner relies entirely on *Ibanez* to support his contention that the disclaimers in section 466.0282 are "unduly burdensome." In *Ibanez*, the plaintiff, a Certified Public Accountant, wanted to include her credentials as a Certified Financial Planner (CFP) (a credential she received by a private organization not affiliated with or sanctioned by the Florida Board of Accountancy) in her advertisements to the public. 512 U.S. at 138. Yet, a rule promulgated under Florida's Public Accountancy Act prohibited the use of any "specialist" designation unless accompanied by a disclaimer. *Id.* at 138 n.1. The Supreme Court found the state's disclaimer requirement to be unconstitutional because the Board failed to demonstrate the harm in advertising CFP credentials without a disclaimer and also found the detail required in the disclaimer to be "unduly burdensome." *Id.* at 146. According to the Court, the disclaimer effectively ruled out "notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id.* at 146-47.

However, the *Ibanez* case is distinguishable from the instant case. The disclosure in *Ibanez* required the plaintiff to state in the advertisement "that the recognizing agency [of the CFP credentials] is not affiliated with or sanctioned by the state or federal government, *and* it must set out the recognizing agency's requirements for recognition, including, but not limited to, education, experience, and testing." *Id.* at 146. Borgner argues the disclaimer is lengthy and complex and renders his affiliation with AAID and ABOI ineffective. Yet, the disclaimer in this case only requires the plaintiff to mention that implant dentistry is not a recognized specialty area by the ADA or the Board and/or that the dentist's membership in an organization that recognizes this specialty is not recognized as a specialty accrediting organization by the ADA. Compared to the disclosure requirements in *Ibanez*, the disclaimer in section 466.0282 does not require dentists to set out the AAID's requirements for recognition, such as the dentist's education, experience and testing. Therefore, based on the record in this case, specifically the impact of the disclaimer requirement in section 466.0282, and Supreme Court and our circuit precedent recommending disclaimers as an alternative to outright prohibitions on commercial speech, we find the disclaimer requirements in section 466.0282 to not be especially long or burdensome, but simply an effective manner to convey necessary information to the public.

CONCLUSION

In conclusion, we find that section 466.0282, which requires Florida-licensed dentists to include a disclaimer when advertising a specialty area not recognized by the ADA/the Board and when advertising membership in and credentials from non-state approved credentialing organizations, is constitutional under the First Amendment. The state has a substantial interest in regulating the dental profession, establishing uniform standards for certification, and in ensuring that dentists' advertisements are not misleading to consumers. The statute as it reads advances this interest in a direct and material way; survey results have shown that the public is likely to assume that those advertising a dental "specialty" are in fact certified by the state in that specialty, and including a disclaimer in these advertisements will alert the public to this misconception. Moreover, the current disclaimer requirement is the least restrictive means available to accomplish the state's objective. Therefore, we reverse the district court's grant of summary judgment for Borgner and the AAID and remand the case back to that court, with instructions to grant the Board's cross-motion for summary judgment.

REVERSED and REMANDED.

HILL, Circuit Judge, dissenting:

The majority upholds section 466.0282 against the claim that it unconstitutionally burdens commercial speech. Applying the *Central Hudson* test, the majority concludes that the state has a substantial interest in limiting Dr. Borgner's right to advertise his accreditation by the AAID and ABOI/AD because such advertising is potentially misleading. The majority also holds that the statute's requirement that Dr. Borgner's advertising include a disclaimer (in all capital letters or some other, undescribed, manner "clearly distinguishable" from the rest of the advertisement) that the AAID and the ABOI/AD are not "bona fide" accrediting

organizations satisfies the *Central Hudson* requirement that the restriction be no more extensive than necessary. Since I disagree with both of these conclusions, I must respectfully dissent.

1. *The State's Substantial Interest*

Although commercial speech is accorded First Amendment protection,[1] the state has a substantial interest in protecting the public from potentially misleading advertising. *In re R.M.J.*, 455 U.S. 191, 203 (1982). The majority holds that section 466.0282 protects the public from misleading advertising by limiting the ability of dentists to advertise any credentials they may have from an organization not recognized by the American Dental Association (the "ADA") or the Florida Board of Dentistry (the "Board").[2] Unless such advertising is potentially misleading,[3] then, the statute does

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[1] *See Mason v. Florida Bar*, 208 F.3d 952, 959 (11th Cir. 2000) (Hill, C.J., specially concurring).

[2] Although the majority writes that the statute permits Dr. Borgner to include his credentials from the AAID and the ABOI/ID in his advertising, I agree with the district court that the inartful construction of the statute, at a minimum, has a chilling effect on that speech, and, at worst, confers an empty right to advertise that one is accredited by an organization that the state has branded not "bona fide."

[3] The Board concedes that such advertising is not inherently misleading since Dr. Borgner is, in fact, accredited by these organizations. *See Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 101 (1990) (holding that advertising of such certifications is a verifiable fact, and is not inherently misleading). The Board contends and the majority holds, however, that this advertising is potentially misleading since it may lead the consumer to believe that these organizations are recognized by the ADA or the Board. *Cf. Peel, id.* at 105, 105 n.13 ("We reject the paternalistic assumption that the recipients of [such advertising] are no more discriminating than the audience for children's television.... We prefer to assume that the average consumer, with or without knowledge of the legal profession, can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what,

not serve a substantial state interest and unconstitutionally burdens commercial speech.

How does Dr. Borgner's advertising of his AAID and ABOI/AD credentials mislead the public? The Board does not claim that these are not bona fide, nationally recognized organizations whose members may earn credentials reflecting extensive training and significant experience in the field of implant dentistry.[4] Indeed, the Board itself, prior to the legislature's enactment of section 466.0282 in 1994, recognized both the AAID and the ABOI/ID as "bona fide organizations that credential dentists in the area of implant dentistry." *Borgner v. Brooks*, 152 F. Supp. 2d 1317, 1324 (N.D. Fla. 2001). In recognizing that, under the Florida statutes then in effect, a dentist was free to advertise his certification from these organizations, the Board said nothing to suggest that such advertising might be misleading to the public. *Id.*

Now, however, the Board claims that such advertising is "misleading" because it may cause the public to believe incorrectly that the State of Florida has issued these credentials or officially approves the AAID and the ABOI/ID.

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if any, value to accord this information.")

[4] In order to qualify for AAID's "Associate Fellow" status, a dentist must (1) complete at least 300 hours of continuing education in implant dentistry, including at least 150 hours of clinical implant education; (2) pass a written examination; and (3) successfully complete an oral/clinical treatment case examination. Some of the requirements for the "Fellow" credential include (1) 5 or more years of experience in the practice of implant dentistry; (2) completion of 100 hours of continuing education in implant dentistry in addition to the 300 hours required for Associate Fellow status; (3) completion of dental implant treatment of at least 50 cases; (4) successful completion of an oral examination; and (5) satisfactory presentation of ten cases to the AAID's Admissions and Credential Board. The AAID has approximately 2200 members, roughly 500 of whom have earned one or both of these credentials.

The Board submitted to the district court the results of two surveys which it argued demonstrate empirically that such advertising misleads in this way.[5]

The district court found this evidence "altogether insufficient" to meet the Board's substantial burden under *Central Hudson* to "demonstrate that the restrictions it places on speech target an identifiable harm and mitigate against such harm in a direct and effective manner." 152 F. Supp. 2d at 1322-23 (citing *Mason v. The Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000) (state must be able to show that the regulation directly addresses an actual harm)). The district court held that, in the absence of any evidence that these organizations, previously recognized by the Board as bona fide, are, instead, sham organizations that make "no inquiry into the recipient's fitness," or "issue[ ] certificates indiscriminately for a price," *see Peel*, 496 U.S. at 102,[6] Dr. Borgner's advertising of his

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[5] In this regard, I note that these surveys were both untimely and incompletely filed. Although it was "sympathetic to Plaintiffs' complaints about Defendants' untimely disclosures," the district court declined to grant plaintiffs' motion to strike the surveys, noting that "[a]ny prejudice to Plaintiffs from lack of opportunity to meet Defendants' late-filed surveys could be cured by permitting Plaintiffs to take additional depositions at Defendants' expense." The district court did not so order, however, because it found that the surveys were "altogether insufficient to satisfy Defendants' burdens under *Central Hudson*." It appears to me, therefore, that, even if the results claimed for the surveys are sufficient to establish that the commercial speech at issue is misleading, as the majority opinion holds, this case should be remanded to the district court for a determination of the plaintiffs' motion to strike the surveys before the entry of final judgment.

[6] In *Peel*, the Supreme Court struck down an Illinois statute prohibiting attorneys from advertising their certification by National Board of Trial Advocacy (the "NBTA") where there was no showing that the NBTA was not a reputable, credible certifying organization or that the public would be misled in any way by a lawyer advertising his certification by it. 496 U.S. at 102.

certification by these organizations produced no identifiable harm. *Id.* at 9.

The majority rejects this conclusion because, according to it, the district court focused on the "irrelevant" issue of whether these organizations are "'sham organizations' or were somehow illegitimate." The majority concedes, then, that its earlier claim that "Florida's desire to regulate dentists' advertisements due to its interest in 'protecting its citizens from unqualified and incompetent health care professionals,'" Majority Opinion at 10, is not the real harm addressed by section 426.0282. If it were, the district court would be entirely correct that the statute does not mitigate that harm in any direct or effective manner.

According to the majority, "[t]he harm the state is seeking to mitigate is not that consumers will be harmed by AAID certified dentists, but that consumers may be led into thinking that such a dentist enjoys state recognition and approval." Majority Opinion 12-13 n.7.[7] The real issue in this case, therefore, is whether this interest is substantial enough to pass constitutional muster. I do not believe that the Board has demonstrated that it is.

It is clearly not enough for the Board to identify some way—*any* way—in which Dr. Borgner's advertisements might confuse. As we said in *Mason*, "[u]nfamiliarity is not synonymous with misinformation." 208 F.3d at 957. *See also Peel*, 496 U.S. at 102-03 ("there is no evidence that the consumers ... are misled if they do not inform themselves of the precise standards under which claims of certification are allowed"). In order to offend the Constitution, commercial speech must produce some "identifiable harm "that is significant enough to permit the state to mitigate it. *Mason*,

[7] I note that anyone interested can easily ascertain whether the organizations certifying Borgner are state approved.

208 F.3d at 957. In this case, the only "harm" the Board has identified as proceeding from potential consumer confusion of the AAID credential with state certification is that the advertising dentist might gain a "competitive edge."[8] I do not think that this harm is constitutionally significant.[9] As a result, I would affirm the district court's holding that Florida Statute section 466.0282 has not been shown to target a genuine threat of identifiable harm substantial enough to justify the restrictions it places on Dr. Borgner's protected speech.[10]

2. *The Statute's Burden*

I also believe that the statute fails to meet the fourth requirement of *Central Hudson* which is that it not be "more extensive than is necessary" to mitigate the harm identified by the state. 447 U.S. at 566. A consumer reading the required statutory disclaimer that the AAID is "NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING

[8] The Board's expert rendered the following opinion about the findings of the surveys:

> These findings indicate that advertisement about "certification" and/or "specialization" in implant dentistry—regardless of whether respondents know the credentialing agency or not—will persuade much of the public that such dentists are worthy, capable, and trustworthy. Such advertising will confer a *professional advantage* upon dentists who advertise themselves as credentialed by organizations that are not accepted by the American Dental Association. (emphasis added)

The district court concluded the "survey does not establish that this competitive edge is unmerited."

[9] Indeed, I believe that the state has an interest in protecting competition in the marketplace for dentistry.

[10] Of course, the state does have a substantial interest in preventing professionals from advertising credentials granted by bogus or sham organizations. The Board has conceded, and the majority does not hold, however, that this interest is present in this case.

ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY" may well conclude that the AAID is a bogus organization or diploma mill—neither of which conclusions is justified. In the absence of some demonstration that this confusion is not at least as likely as the confusion that AAID is a state-sponsored organization, I believe the statute fails the fourth prong of the *Central Hudson* test.

The "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Peel*, 496 U.S. at 108. I believe that today's decision does not advance this principle, and for all the reasons given above, I respectfully dissent.

UNITED STATES DISTRICT COURT
N.D. FLORIDA
TALLAHASSEE DIVISION

Richard A. BORGNER, D.D.S., et al.,
Plaintiffs,
v.
Robert G. BROOKS, M.D.,
in his Official Capacity as Secretary,
Department of Health, et al.,
Defendants.

No. 4:99CV211-WS

March 21, 2001

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STAFFORD, Senior District Judge

In 1997, Dr. Richard A. Borgner ("Dr. Borgner") and the American Academy of Implant Dentistry ("AAID") filed an action in this court, case number 4:97cv93-WS, challenging a 1996 Florida statute that prohibited Florida licensed dentists from advertising membership in, or specialty recognition by, organizations not recognized by the American Dental Association ("ADA"). Fla. Stat. § 466.0282 (1996). That lawsuit ended when this court declared the challenged 1996 law unconstitutional to the extent it prohibited Dr. Borgner from advertising his membership and credentialed status in non-ADA-recognized organization. *See Borgner v. Cook*, 33 F. Supp. 2d 1327 (N.D. Fla. 1998).

Dr. Borgner and the AAID (collectively, "Plaintiffs") have now returned to this court to mount a constitutional challenge to the revised statute, section 466.0282, enacted by

the Florida Legislature in 1999.[1] Plaintiffs contend that the revised statute, like the earlier statute, infringes upon their First Amendment right to freedom of commercial speech.

Before the court at this time are the parties' cross-motions for summary judgment (docs. 59, 62 & 82). Responses to the motions have been filed, and the parties have been advised that the motions would be taken under advisement as of a date certain.

I.

Dr. Borgner is a licensed dentist who practices general dentistry with an emphasis in implant dentistry in St. Petersburg, Florida. Any dentist with a general license to practice as a dentist may perform implant dentistry in Florida. No special training or education beyond that required for the license to practice as a dentist is required.

The AAID is a national dental organization whose member dentists may earn credentials—specifically, Associate Fellow and Fellow—in the field of implant dentistry. The requirements for the Associate Fellow credential include: (1) completion of at least three hundred (300) hours of continuing education in implant dentistry, including at least one hundred fifty (150) hours of sciences related to implant dentistry and one hundred fifty (150) hours of clinical implant education; (2) a passing score on a written examination; and (3) successful completion of an oral/clinical treatment case examination. Some of the requirements for the Fellow credential include: (1) five or more years of experience in the practice of implant dentistry; (2) completion of one hundred (100) hours of continuing education in implant dentistry in

[1] Defendants were represented by the Florida Attorney General's office in the earlier case. On July 28, 1999, after filing an initial response on Defendants' behalf in this case, the Attorney General notified Defendants that his office was declining to otherwise defend the case. Doc. 48 at ¶ 2.

addition to the three hundred (300) hours required for Associate Fellow status; (3) completion of dental implant treatment of at least fifty (50) cases; (4) successful completion of an oral examination; and (5) satisfactory presentation of ten cases to the AAID's Admissions and Credentials Board. The AAID has approximately twenty-two hundred (2200) members, roughly five hundred fifty (550) of whom have earned the credential Associate Fellow and/or Fellow.

The AAID sponsors a certifying board, the ABOI/ID, which issues the Diplomate, or Board-Certified, credential to dentists who receive a passing score on the ABOI/ID's certification examination and who fulfill certain educational and experiential requirements. Since the ABOI/ID first began issuing its credentials in 1989, approximately 200 dentists in the United States have earned the ABOI/ID's Diplomate or Board Certified credential.

Dr. Borgner is a member and "Fellow" of the AAID. He is also a "Diplomate" of the American Board of Oral Implantology/Implant Dentistry ("ABOI/ID"). Dr. Borgner has advertised in the past, and wants to continue advertising in the future, both his membership in the AAID as well as his Fellow and Diplomate credentials.

II.

As amended in 1999, section 466.0282, Florida Statutes, provides that:

> (1) A dentist licensed under this chapter may not hold himself or herself out as a specialist, or advertise membership in or specialty recognition by an accrediting organization, unless the dentist:
>
> (a) Has completed a specialty education program approved by the American Dental Association and the Commission on Dental Accreditation and:

1. Is eligible for examination by a national specialty board recognized by the American Dental Association; or

2. Is a diplomate of a national specialty board recognized by the American Dental Association; or

(b) Has continuously held himself or herself out as a specialist since December 31, 1964, in a specialty recognized by the American Dental Association.

(2) A dentist licensed under this chapter may not represent to the public without appropriate disclosure that his or her practice is limited to a specific area of dentistry other than a specialty area of dentistry authorized under subsection (1), unless the dentist has attained membership in or has otherwise been credentialed by an accrediting organization which is recognized by the board as a bona fide organization for such an area of dental practice. In order to be recognized by the board as a bona fide accrediting organization for a specific area of dental practice other than a specialty area of dentistry authorized under subsection (1), the organization must condition membership or credentialing of its members upon all of the following:

(a) Successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is:

1. Beyond the dental degree;

2. At the graduate or postgraduate level; and

3. Of at least 12 months in duration.

(b) Prior didactic training and clinical experience in the specific area of dentistry which is greater than that of other dentists.

(c) Successful completion of oral and written examinations based on psychometric principles.

(3) Notwithstanding the requirements of subsections (1) and (2), a dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the board may announce a practice emphasis in any other area of dental practice if the dentist incorporates in capital letters or some other manner clearly distinguishable from the rest of the announcement, solicitation, or advertisement the following statement: "... (NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) ... IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY." If such an area of dental practice is officially recognized by an organization which the dentist desires to acknowledge or otherwise reference in the dentist's announcement, solicitation, or advertisement, the same announcement, solicitation, or advertisement shall also state prominently: "*(NAME OF REFERENCED ORGANIZATION) IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.*"

Fla. Stat. § 466.0282(1)-(3) (1999) (emphasis in original).

Implant dentistry has *not* been approved as a dental specialty by the ADA.[2] Furthermore, neither the AAID nor the ABOI/ID is "a national specialty board recognized by the ADA." Fla. Stat. § 466.0282(1). Likewise, neither the AAID

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[2] The special areas of dental practice currently recognized by the American Dental Association ("ADA") are: dental public health, endodontics, oral and maxillofacial pathology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, and prosthodontics.

nor the ABOI/ID is "recognized by the [Florida Board of Dentistry] as a bona fide accrediting organization for a specific area of dental practice other than a specialty area of dentistry authorized under subsection (1)," Fla. Stat. § 466.0282(1).

III.

Dr. Borgner wants to advertise that he is a member and Fellow of the AAID as well as a Diplomate of the ABOI/ID. He contends that amended section 466.0282 prohibits him from doing so. Defendants, on the other hand, interpret section 466.0282 differently. They say that section 466.0282 permits a dentist to advertise membership in and credentials from an organization not approved by the ADA or the Florida Board of Dentistry so long as the advertisement also includes the disclosure statement required by section 466.0282(3).

Subsection (2) of section 466.0282 states that, with one exception not applicable to Dr. Borgner, a dentist "may not represent to the public without appropriate disclosure that his or her practice is limited to a specific area of dentistry other than a specialty area" recognized by the ADA. Subsection (3) provides that, a dentist may, with appropriate disclosure, "announce a practice emphasis" in an area not recognized as a specialty area by the ADA or the Board. The statute thus plainly permits Dr. Borgner to announce a practice emphasis in implant dentistry and/or to represent that his practice is limited to implant dentistry so long as he "incorporates in capital letters or some other manner clearly distinguishable from the rest of the announcement, solicitation, or advertisement the following statement: '[IMPLANT DENTISTRY] IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.' " Fla. Stat. § 466.0282(3).

Whether the statute also permits Dr. Borgner to advertise his membership in and credentials from the AAID and

ABOI/ID is less clear. Subsection (1) of section 466.0282 states that, with two exceptions not applicable to Dr. Borgner, a dentist licensed in Florida may not advertise "membership in or specialty recognition by an accrediting organization." Dr. Borgner contends that subsection (1) unambiguously prohibits him from advertising his membership in and credentials from the AAID and ABOI/ID.

Defendants, on the other hand, suggest that the clear prohibition of subsection (1) should be ignored because the last sentence of subsection (3) and the first sentence of subsection (4) imply that the Florida Legislature did not mean what it said in subsection (1). The last sentence of subsection (3) states: "If [implant dentistry] is officially recognized by an organization which the dentist desires to acknowledge or otherwise reference in the dentist's ... advertisement, the same ... advertisement shall also state prominently: '*(NAME OF REFERENCED ORGANIZATION) IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.*'" Fla. Stat. § 466.0282(3) (1999) (emphasis in original). The first sentence of subsection (4) provides:

> (4) The purpose of this section is to prevent a dentist from advertising without appropriate disclosure membership in an organization which may be perceived by the public as recognizing or accrediting specialization or other unique competencies in an area of dentistry that is not recognized or accredited by the American Dental Association or the board in accordance with this section.

Fla. Stat. § 466.0282(4) (1999). According to Defendants, these two sentences reveal that the Florida Legislature intended to permit a dentist to advertise membership in and credentials from an organization not approved by the ADA or the Board so long as the advertisement also includes the

required disclosure statement. Indeed, that is the position taken by the Board, at least for purposes of this lawsuit.

Notwithstanding Defendants' generous construction of section 466.0282, the court is confident that Dr. Borgner's interpretation is not an unreasonable one. Anything but a model of clarity, the statute—at best—can lead to a chilling effect because dentists are left to wonder whether the language in subsections (3) and (4) is sufficient to overcome the very clear prohibition stated in subsection (1).[3] At worst, subsection (1) means what it says: "A dentist [who does not qualify for the two exceptions provided] ... may not ... advertise membership in or specialty recognition by an accrediting organization." Either way, section 466.0282 restricts Dr. Borgner's First Amendment right to freedom of commercial speech.

IV.

In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the Supreme Court articulated the following four-part test for assessing the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances

[3] Defendants have submitted no evidence that any kind of an official interpretative opinion has been issued to advise dentists that section 466.0282 permits them to advertise membership in and credentials from an organization not approved by the ADA or the Board.

> the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S. Ct. 2343.

Courts have generally divided the first element of the *Central Hudson* test, the "misleading" element, into two categories: "inherently" misleading versus "potentially" misleading. If speech is "inherently" misleading, it may be restricted without reference to the remaining three *Central Hudson* factors. In contrast, if speech is merely "potentially" misleading, a state may not restrict the speech unless it can satisfy the last three prongs of the *Central Hudson* analysis.

The Eleventh Circuit recently stated that the "penultimate prong" of the *Central Hudson* test requires a governmental entity to demonstrate that the restrictions it places on speech both target an identifiable harm and mitigate against such harm in a direct and effective manner. *Mason v. The Florida Bar*, 208 F.3d 952 (11th Cir. 2000). Furthermore, the court in *Mason* held that "[a governmental entity] is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban, on [an individual's] speech." *Mason*, 208 F.3d at 958; *see also Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform").

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990), the Supreme Court held that a lawyer's use of the designation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" ("NBTA") was neither actually nor inherently misleading. The Court explained that "[a] claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success ... but is simply a fact, albeit one with multiple predicates, from

which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101, 110 S. Ct. 2281. The Court went on to note that the predicate requirements for NBTA certification were verifiable facts as well. Furthermore, the Court found that there was not only no suggestion that the NBTA issued certificates to lawyers indiscriminately but also no evidence that anyone was in fact misled or deceived by the advertisement. Absent such evidence, the Court concluded that the lawyer's advertisement of his certification could not be considered misleading or deceptive on its face.

The Court later extended the lessons in *Peel* to a case involving a lawyer, Silvia Ibanez ("Ibanez"), who advertised her credentials as a Certified Public Accountant ("CPA") and a Certified Financial Planner ("CFP").[4] *Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994). Ibanez was reprimanded by the Florida Board of Accountancy ("FBA") for engaging in "false, deceptive, and misleading" advertising. As to Ibanez's use of the CFP designation, the FBA argued that any designation using the term "certified" to refer to a certifying organization other than the FBA itself or an organization approved by the FBA "inherently mislead[s] the public into believing that state approval and recognition exists." *Ibanez*, 114 S. Ct. 2084, 129 L. Ed. 2d at 125. The Court rejected the FBA's argument, noting that such argument was "difficult to maintain in light of *Peel*," *Ibanez*, 114 S. Ct. 2084, 129 L. Ed. 2d at 127. The Court also rejected the FBA's argument that use of the CFP

[4] A private organization, the Certified Financial Planner Board of Standards, authorizes use of the trademarked designation "Certified Financial Planner" to persons who satisfy certain core educational requirements, who receive a passing score on a certification examination, who complete a planning-related work experience requirement, who agree to abide by the CFP Code of Ethics and Professional Responsibility, and who complete an annual continuing education requirement.

designation was potentially misleading, entitling the FBA to enact measures short of a total ban to prevent deception or confusion. The Court explained that if the "'protections afforded commercial speech are to retain their force' ... we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez*, 114 S. Ct. 2084, 129 L. Ed. 2d at 128 (cites omitted). The FBA having failed to point to any real—as opposed to hypothetical—harm, the Court concluded that the FBA's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Ibanez*, 114 S. Ct. 2084, 129 L. Ed. 2d at 127-128 (quoting *Peel*, 496 U.S. at 111, 110 S. Ct. 2281); *see also Edenfield v. Fane*, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (striking down Florida ban on CPA solicitation where FBA presented neither studies suggesting that personal solicitation created the dangers the FBA claimed to fear nor anecdotal evidence validating the FBA's suppositions); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-649, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) (striking down restrictions on attorney advertising where "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind").

In *Parker v. Kentucky Board of Dentistry*, 818 F.2d 504 (6th Cir.1987), the Sixth Circuit considered a Kentucky statute that prohibited general dental practitioners from holding themselves out to the public as specialists, or as being "especially qualified," in a particular branch of dentistry. As a general dental practitioner, Stanley Parker ("Parker") was permitted under Kentucky law to perform services in all recognized branches of dentistry, including orthodontia, but he was nevertheless prohibited from using the words "orthodontics," "braces," "brackets," and similar terms in advertising his services. When Parker in fact placed an

advertisement in the Yellow Pages listing as some of his services, "Orthodontics with Clear & Metal Brackets," and "Orthodontics without Braces," the Kentucky Board of Dentistry instituted disciplinary proceedings against him. On appeal from the trial court's order finding the Kentucky law unconstitutional, the Kentucky Board of Dentistry argued that Parker's use of such words as "orthodontics" and "braces" could actually or potentially mislead the general public into believing that he was a "specialist" in the area of orthodontics. The Sixth Circuit, however, found that Parker's advertisement—a truthful description of services that he was permitted under Kentucky law to perform—was *not* inherently misleading. While willing to assume that Parker's advertisement could be potentially misleading, the Sixth Circuit nonetheless concluded that Kentucky's out-right ban on the use of specific, non-deceptive terms could not be justified under the Constitution or Supreme Court precedent. *See also Bingham v. Hamilton*, 100 F. Supp. 2d 1233 (E.D. Cal. 2000) (finding unconstitutional a California regulation that prohibited a dentist from advertising that he was a Fellow and Diplomate of the AAID and ABOI/ID respectively).

V.

Defendants in this case concede that the speech at issue—namely, Dr. Borgner's advertisement of his membership in and credentials from the AAID and ABOI/ID—is "potentially" rather than "inherently" misleading. Indeed, in light of *Peel*, *Ibanez*, and *Parker*, it would be difficult for Defendants to argue otherwise. Defendants accordingly bear the substantial burden of demonstrating that the restrictions placed on a dentist's speech by section 466.0282 both target an identifiable harm and mitigate against such harm in a direct and effective manner. Plaintiffs contend, and this court agrees, that Defendants have not satisfied such a burden.

Defendants have produced no evidence to suggest that implant dentistry is an illegitimate or unrecognized area of dental practice, that either the AAID or the ABOI/ID is a sham organization, that either organization awards credentials or certifications indiscriminately based upon something other than objectively verifiable criteria, that anyone has complained to the Board about being misled, deceived or confused by an advertisement that includes information regarding a dentist's membership in and/or credentials from the AAID or the ABOI/ID, or that anyone has complained about a dentist who—like Dr. Borgner—has advertised his credentials in these organizations.

Interestingly, in 1994, before the Florida Legislature enacted section 466.0282, the Board itself issued a final order on a petition filed by Frank R. Recker, D.D.S., for a declaratory statement as to the ability of AAID members to advertise their status as fellows of the AAID and diplomates of the ABOI/ID. Doc. 1, Ex. D. In its order, BOD 94-01DS, the Board reported as a finding of fact that "the AAID and the ABOI/ID are bona fide organizations that credential dentists in the area of implant dentistry." *Id.* at 2. The Board also reported as a conclusion of law that the Florida statutes and/or administrative rules then in effect permitted a dentist to advertise his or her "Fellow" status in the AAID as well as his or her "Diplomate" status in the ABOI/ID so long as the advertisement did not imply to the public that the advertising dentist had obtained specialty status. *Id.* The Board said nothing in its order to suggest that advertisement of a dentist's credentials in the AAID and/or the ABOI/ID might be misleading to the public.

The record establishes that any dentist with a general license to practice as a dentist may perform implant dentistry in Florida. Does it not defy common sense to think that the public might be harmed by learning that a dentist, whose practice includes implant dentistry, has taken the extra steps necessary to become a credentialed member of an implant

organization? If anyone has a question or a concern about what a dentist's credentials from the AAID and/or the ABOI/ID mean, it takes only a few minutes with access to the Internet to learn precisely what the dentist was required to do to earn those credentials.

While Defendants do not dispute that Dr. Borgner's credentials from the AAID and ABOI/ID—along with the predicate requirements for those credentials—constitute verifiable facts, they nevertheless contend that "[i]t can reasonably be expected that many consumers would assume that a person advertising certification as a dental specialist has received such certification either from a state agency or from a board recognized by a state agency." Doc. 64 at 10. To support their contention, Defendants have filed a document that presents the results of a recent survey commissioned by the Board for purposes of this litigation. The survey—entitled "A Study of Florida Residents Regarding Attitudes about the State of Florida's Role in Certifying Dental Specialists"—was conducted by the Florida Survey Research Center between December 15, 1999, and January 5, 2000.

On January 6, 2000, one day after the survey was concluded and one day before the end of the twice-extended discovery period, Defendants provided Plaintiffs with a copy of the final report setting out the results of the just-completed survey. On January 27, 2000, twenty days after the close of discovery and without ever before disclosing the name of an expert witness, Defendants filed—as attachments to their summary judgment motion—the final reports of two studies—the recent study as well as an earlier study completed in 1998—along with a copy of an affidavit signed by Dr. Michael J. Scicchitano ("Dr. Scicchitano"). Dr. Scicchitano disclosed that he was the Director of the Florida Survey Research Center and the man under whose supervision the surveys were designed and conducted. While he also represented that the surveys met "generally accepted industry standards for representative sampling of the general

population," he provided no other information regarding survey design and methodology. Doc. 64, Ex. B. The original of that affidavit was filed on February 1, 2000. Doc. 67.[5]

On February 9, 2000, noting Defendants' "obtuse attempt to circumvent the already generous discovery extensions granted to the Defendants," Plaintiffs filed a motion to strike both the affidavit and the final survey reports submitted by Defendants. Doc. 69. Needless to say, the timing of Defendants' disclosures made it difficult, if not impossible, for Plaintiffs to depose either Dr. Scicchitano or an expert of their own choosing who could render an opinion about the surveys' design, methodology, and/or results. Significantly, Dr. Scicchitano's affidavit and the survey reports represent the only evidence produced by Defendants.

While sympathetic to Plaintiffs' complaints about Defendants' untimely disclosures, the court declines to strike Defendants' evidence based on discovery abuses alone. Any prejudice accruing to Plaintiffs from lack of opportunity to meet Defendants' late-filed surveys could be cured by permitting Plaintiffs to take additional depositions at Defendants' expense. Additional depositions are unnecessary, however, because the court finds that Dr. Scicchitano's affidavit, combined with his final survey reports, are altogether insufficient to satisfy Defendants' burdens under *Central Hudson*.

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[5] In the earlier litigation, Case No. 97cv93, months after the discovery period closed, Defendants asked the court to reopen discovery to permit the filing of "a recently completed Report" of a survey conducted by the Florida Survey Research Center between February 3, 1998, and February 15, 1998. The report was accompanied by an affidavit from Dr. Kenneth D. Wald, a previously-undisclosed expert under whose supervision the survey was conducted. Dr. Wald's affidavit contained a description of the study/survey along with his interpretation of the survey results. The court denied Defendants' request.

Survey results offered as proof of the matter asserted are hearsay and are inadmissible unless the survey falls into a recognized class exception to the hearsay rule or into the residual exception contained in Federal Rule of Evidence 807. Arguably, the surveys in this case fall into the category of statements excepted from the hearsay rule under Rule 803(3): namely, statements that express a declarant's state of mind at the time of the utterance. *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218 (2d Cir. 1999). If not excepted under Rule 803(3), the surveys would perhaps be admissible under Rule 807, which provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent *circumstantial guarantees of trustworthiness*, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed.R.Evid. 807 (emphasis added). With regard to survey evidence, at least one court has said that "the circumstantial guarantees of trustworthiness are for the most part satisfied if the [survey] is conducted in accordance with generally accepted survey principles." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998) (quoting *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978)).

Assuming, just for the sake of argument, that Defendants' surveys are admissible, the court is nonetheless unwilling to accord the surveys much weight. The 1998 survey, entitled "A Study of Florida Residents Regarding Dentists and Dental Specialists," was "designed to determine whether laypersons [would] be drawn to dentists who advertise themselves as

'certified' or 'specialists' by virtue of membership in organizations that have not been recognized as acceptable credentialing organizations by the ADA." Doc. 64, Ex. C. The more recent survey was designed to assess "respondents' perceptions of the role of the State of Florida in assuring the qualifications of dentists that advertise themselves as specialists in a particular area." Doc. 64, Ex. B. Neither survey assessed what, if any, harm would result from permitting a dentist to advertise either a practice emphasis in implant dentistry or membership in and credentials received from the AAID or ABOI/ID.

In the 1998 survey, one thousand (1000) individuals were interviewed by phone regarding their attitudes about dentists and dental specialists. When asked to indicate how important each of six sources[6] of information was to their decision to select an orthodontist or "implant specialist," just under eighty percent (80%) of the respondents revealed that it was "somewhat" if not "very" important to know that an orthodontist or "implant specialist" was certified as a specialist by an ADA-approved board. Over eighty percent (80%) of the respondents indicated that a recommendation by a friend or family member was either "very" or "somewhat" important to their decision. More than half of the respondents indicated that yellow-page or other advertisements were either "not very" or "not at all" important to their decision to select an "implant specialist." It is not apparent what the respondents answers would have been had they been told that the ADA does not recognize implant dentistry as a "specialty," that there is no "ADA-approved board" that certifies dentists as "implant specialists," or that the Florida Board of Dentistry

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[6] The telephone respondents were asked about the following six sources of information: a friend's or relative's recommendation, an advertisement, an insurance company's recommendation, an ADA-approved board's certification, a yellow pages advertisement, and a recommendation by a family dentist.

considers all licensed dentists qualified to practice implant dentistry.

The telephone respondents were also asked how familiar they were with the ADA, the AAID, and the "National Council for Dental Implants," the latter being a fictitious organization used as a baseline to compare responses regarding the other two dental certifying organizations. Approximately fifty- seven percent (57%) of the respondents were either "very familiar," "familiar," or "somewhat familiar" with the ADA. In contrast, little more than five percent (5%) of the respondents indicated that they had some level of familiarity with the AAID. Four percent (4%) actually revealed a level of familiarity with the fictitious organization, which suggests that a similar percentage of respondents may have feigned familiarity with the ADA and/or the AAID.

Slightly more than half of the respondents who said they were either "very" or "somewhat" familiar with the AAID also said that they would be more willing to visit, to express confidence in, and to trust the recommendations of, a dentist who they knew to be certified as a "specialist" by the AAID. Approximately eighty percent (80%) of the respondents familiar with the ADA said they would be more willing to visit, to express confidence in, and to trust the recommendations of, a dentist known to be certified as a "specialist" by the ADA.

Professor Kenneth D. Wald rendered the following opinion about the findings of the 1998 survey:

> These findings indicate that advertisement about "certification" and/or "specialization" in implant dentistry—regardless of whether respondents know the credentialing agency or not—will persuade much of the public that such dentists are worthy, capable, and trustworthy. **Such advertising will confer a professional advantage upon dentists who advertise themselves as credentialed by organizations that are**

> **not accepted by the American Dental Association.** By virtue of its trust in credentialing and lack of expertise, a large proportion of the public is ripe to be misled in the choice of dentists to perform implantation. The public lacks the knowledge to discern the value of credentialing by organizations that have and have not been approved by the American Dental Association. It is also clear that the public would put great confidence in the judgment of the American Dental Association if that organization chose to recognize a credentialing body in implant dentistry. Because the American Dental Association does not recognize such a certification, the public will be disposed to choose dentists who advertise such credentials from the AAID over members of the American Dental Association who forego such advertising—even though the public puts considerable trust in the ADA.

Doc. 64, Ex. C., Dr. Wald's Aff. at ¶ 16 (emphasis in original).

As indicated by Dr. Wald, the results of the 1998 survey suggest that dentists who advertise "certification" and/or "specialization" may have a competitive edge over dentists who do not so advertise. The survey does not establish that any such competitive edge is unmerited. The survey also does not establish that dentists who advertise "certification" or "specialization" are less worthy, capable, and trustworthy than dentists who either have no "certification" or "specialization" to advertise or who have a "certification" or "specialization" but choose not to advertise it. Quite simply, the 1998 survey may have produced results of interest to the ADA, but it did not produce results sufficient to convince this court that the infringements imposed by section 466.0282 on Dr. Borgner's First Amendment rights are constitutional.

With the more recent survey, Defendants have not included an expert's interpretation of the results. Left to its own devices, the court finds that the second survey is no more

helpful than the first. The very brief survey report reveals that five hundred (500) individuals were interviewed by phone about their perceptions regarding the State of Florida's role in overseeing dentists who advertise (1) as being specialists in a particular area, (2) as being board-certified specialists in a particular area, or (3) as having practices limited to a certain area. Although the report fails to set out the precise questions that were asked of the respondents, it appears that nearly two-thirds of the respondents said they believed that dentists who advertise as being board-certified specialists in a particular area have been certified directly by the State of Florida or certified by a national organization that is recognized by the State of Florida. In addition, the report indicates that approximately fifty-seven percent (57%) of the respondents said they believed that dentists who advertise as being specialists in a particular area or as having their practices limited to a certain area have been either directly or indirectly certified by the State of Florida. Again, while these results may be interesting, they do not convince this court that the State of Florida, through enactment of section 466.0282, targets a genuine threat of harm and/or furthers substantial state interests in a direct and effective manner.

Absent any other evidence to support the restrictions placed on Dr. Borgner's First Amendment rights by section 466.0282, this court finds that Defendants have failed to satisfy their burden under the *Central Hudson* test. Plaintiffs are therefore entitled to summary judgment.

Accordingly, it is ORDERED:

1. Plaintiffs' motion for summary judgment (doc. 59) is GRANTED.

2. Defendants' motion for summary judgment (doc. 62) is DENIED.

3. Section 466.0282, as amended, is DECLARED unconstitutional to the extent it prohibits Dr. Borgner from advertising his membership in the AAID and his credentialed status in the AAID and ABOI/ID, and Defendants are ENJOINED from enforcing section 466.0282, as amended, against Dr. Borgner for advertising his membership in the AAID and his credentialed status in the AAID and ABOI/ID.

4. Section 466.0282, as amended, is also DECLARED unconstitutional to the extent that it prohibits Dr. Borgner from either representing to the public that his practice is limited to implant dentistry or announcing a practice emphasis in implant dentistry without also incorporating a disclosure statement. Defendants are ENJOINED from enforcing the disclosure requirement of section 466.0282, as amended, against Dr. Borgner.

5. The clerk is directed to enter judgment in Plaintiffs' favor, with costs taxed to Defendants.

United States District Court,
N.D. Florida,
Tallahassee Division.

Richard A. BORGNER, D.D.S.,
and the American Academy of Implant Dentistry,
Plaintiffs,
v.
Doug COOK, in His Official Capacity as Director,
State of Florida, Agency for Health*Care Administration,
and Faustino Garcia, D.M.D, Solomon G. Brotman, D.D.S.,
Phil J. Levine, D.D.S., Charles L. Ross, D.D.S.,
Edward R. Scott, II, D.M.D., Carol E. Williamson, D.M.D.,
Jacqueline B. McDonough, R.D.H.,
Irene J. Stavros, Hilda H. Genco, Mary L. McDonald,
in Their Official Capacities,
as Members of the Florida Board of Dentistry,
Defendants.

No. 4:97cv93-WS.

July 16, 1998.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STAFFORD, Senior District Judge.

In this action for declaratory and injunctive relief, the plaintiffs, Richard Borgner, D.D.S., and the American Academy of Implant Dentistry (collectively "Plaintiffs"), ask the court to declare unconstitutional, and to enjoin the defendants from enforcing, section 466.0282, Florida Statutes. Such section prohibits Florida licensed dentists from advertising membership in, or specialty recognition by, an accrediting organization that is not recognized or accredited by the American Dental Association. Plaintiffs contend that section 466.0282 violates the First Amendment to the

Amendment to the United States Constitution, specifically the First Amendment right to freedom of commercial speech.

Before the Court at this time is Plaintiffs' motion for summary judgment (doc. 49). The defendants have responded (docs 61-63) to the motion, and the parties have been advised (doc. 77) that the motion would be taken under advisement as of a date certain.

I.

The American Academy of Implant Dentistry ("AAID") is a national dental organization whose member dentist may earn credentials ("Fellow" and "Associate Fellow") in the field of implant dentistry upon satisfying certain experiential, educational, and testing requirements. At the time this case was filed, AAID had approximately one hundred seventy-two (172) dentist-members who practiced dentistry in the State of Florida.

AAID sponsors a national certifying board, the American Board of Oral Implantology/Implant Dentistry ("ABOI/ID"). The ABOI/ID issues the credential of "Diplomate" upon a dentist's fulfillment of certain educational, experiential and examination requirements. When this suit was filed, approximately one hundred twenty-five dentists nationwide had attained the status of "Diplomate" of the ABOI/ID.

Richard Borgner ("Borgner") is a Florida licensed dentist who concentrates his practice in the field of implant dentistry. As a credentialed member of AAID, Borgner has advertised in the past, and wants to continue advertising in the future, (1) his membership in AAID; (2) his status as "Fellow" of AAID; and (3) his status as "Diplomate" of ABOI/ID.

In August, 1994, the Florida Board of Dentistry (the "Board") issued a final order on a petition filed by Frank R. Recker, D.D.S., for a declaratory statement as to the ability of AAID members to advertise their status as fellows of the AAID and diplomates of the ABOI/ID. Doc. 1, Ex. D. In its

order, BOD 94-01DS, the Board reported as a finding of fact that "the AAID and the ABOI/ID are bona fide organizations that credential dentists in the area of implant dentistry." *Id.* at 2. The Board also reported as a conclusion of law that the Florida statutes and/or administrative rules then in effect permitted a dentist to advertise his or her "Fellow" status in the AAID as well as his or her "Diplomate" status in the ABOI/ID so long as the advertisement did not imply to the public that the advertising dentist had obtained specialty status. *Id.*

Effective October 1, 1996, the Florida Legislature nullified the Board's 1994 order, BOD 94-01 DS, when it amended Florida law to prohibit dentists in Florida from advertising membership in, or specialty recognition by, organizations not recognized or accredited by the American Dental Association. Fla. Stat., § 466.0282(1) (1996). The Florida Legislature explained as follows:

> The purpose of this section is to prevent a dentist from advertising membership in an organization which may be perceived by the public as recognizing or accrediting specialization in an area of dentistry that is not recognized or accredited by the American Dental Association....The Legislature finds that dental consumers rely on recognition by the American Dental Association as proof that an area of dentistry is recognized as a legitimate dental specialty by other dentists and that the accrediting or recognizing organization of that specialty is bona fide. The Legislature also finds not only that the American Dental Association...has the administrative staff and financial resources necessary to investigate and thoroughly evaluate whether an accrediting or recognizing organization is capable of accurately determining whether an area of dentistry is uniquely defined and educationally disciplined so as to meet a substantial public need for clinical treatment, but also that this accreditation process is the least restrictive means

> available to ensure that consumers are not misled about whether an area of dentistry is a legitimate specialty.

Fla. Stat. § 466.0282(2) (1996).

The special areas of dental practice currently recognized by the American Dental Association ("ADA") are: dental public health, endodontics, oral and maxillofacial pathology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, and prosthodontics. Implant dentistry has *not* been approved as a dental specialty by the ADA, nor has AAID or ABOI/ID received ADA recognition as a dental specialty accrediting organization. Consequently, the effect of section 466.0282(1)—as interpreted by the Florida Board of Dentistry—is to altogether prohibit Florida dentists from advertising their membership in and/or specialty recognition by AAID and ABOI/ID.

Plaintiffs contend that, by placing a categorical ban on all advertising of specialty credentials by dentists whose credentials are not ADA-approved, section 466.0282 blocks the general public's access to truthful and accurate commercial information. Plaintiffs argue such a blockage, or ban, is inconsistent with the free speech guarantees of the First Amendment of the United States Constitution and is contrary to decisions of the United States Supreme Court.

II.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), the United States Supreme Court firmly established that commercial speech enjoys the protections of the First Amendment. The Court was careful to explain, however, that the protections are limited to truthful, non-misleading commercial speech. Commercial speech or advertising which is false, deceptive, or misleading is not so

protected and may be prohibited entirely. *Virginia Bd. of Pharmacy*, 425 U.S. at 771-772, 96 S. Ct. 1817.

The Court acknowledged that state regulation of advertising by physicians and lawyers may be necessary because physicians and lawyers "render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception." *Virginia Bd. of Pharmacy*, 425 U.S. at 773 n.25, 96 S. Ct. 1817. Nonetheless, in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), the Court extended the commercial speech protections announced in *Virginia Board of Pharmacy* to the regulation of advertising by lawyers. Later, writing for a unanimous court in *In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982), Justice Powell summarized the standards applicable to claims involving attorney advertising as follows:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive...Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

In re R.M.J., 455 U.S. at 203, 102 S. Ct. 929.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990), the Court held that Gary Peel's use of the

designation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" was neither actually nor inherently misleading. The Court explained that "[a] claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success...but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101, 110 S. Ct. 2281. Indeed, as noted by the Court, certification was not the only verifiable fact in Peel's case; the predicate requirements for certification by the National Board of Trial Advocacy ("NBTA") were verifiable facts as well. Furthermore, there was no suggestion that the NBTA issued certificates to lawyers indiscriminately, and there was no evidence that a potential client or person was in fact misled or deceived by Peel's advertisement. Absent such evidence, the Court concluded that Peel's advertisement of his certification was not misleading or deceptive on its face.

The Court acknowledged that statements of "certification" as a "specialist," even though truthful, may not be fully understood by some readers. The Court nevertheless concluded that "concern for the *possibility* of deception was not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Peel*, 496 U.S. at 111, 110 S. Ct. 2281 (emphasis added). The Court, therefore, held that, under the First Amendment, the State of Illinois could not justify a prophylactic ban against all advertisement of Peel's specialty certification on the basis that the information was potentially misleading.

The Court later extended the lessons in *Peel* to a case involving a lawyer, Silvia Ibanez ("Ibanez"), who advertised her credentials as a Certified Public Accountant ("CPA") and

a Certified Financial Planner ("CFP").[1] *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994). Ibanez was reprimanded by the Florida Board of Accountancy (the "Board of Accountancy") for engaging in "false, deceptive, and misleading" advertising. As to Ibanez's use of the CFP designation, the Board of Accountancy argued that any designation using the term "certified" to refer to a certifying organization other than the Board of Accountancy itself or an organization approved by the Board of Accountancy "inherently mislead[s] the public into believing that state approval and recognition exists." *Ibanez*, 512 U.S. at 142, 114 S. Ct. at 2088, 129 L. Ed. 2d at 125. The Court rejected the Board of Accountancy's argument, noting that such argument was "difficult to maintain in light of *Peel*." *Ibanez*, 512 U.S. at 144, 114 S. Ct. at 2089, 129 L. Ed. 2d at 127. The Court also rejected the Board of Accountancy's argument that use of the CFP designation was potentially misleading, entitling the Board of Accountancy to enact measures short of a total ban to prevent deception or confusion. The Court explained that if the "'protections afforded commercial speech are to retain their force'...we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez*, 512 U.S. at 143, 114 S. Ct. at 2089, 129 L. Ed. 2d at 128 (cites omitted). The Board of Accountancy having failed to point to any real—as opposed to hypothetical—harm, the Court concluded

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[1] A private organization, the Certified Financial Planner Board of Standards, authorizes use of the trademarked designation "Certified Financial Planner" to persons who satisfy certain core educational requirements, who receive a passing score on a certification examination, who complete a planning-related work experience requirement, who agree to abide by the CFP Code of Ethics and Professional Responsibility, and who complete an annual continuing education requirement.

that the Board of Accountancy's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Ibanez*, 512 U.S. at 145, 114 S. Ct. at 2090, 129 L. Ed. 2d at 127-128 (quoting *Peel*, 496 U.S. at 111, 110 S. Ct. 2281); *see also Edenfield v. Fane*, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (striking down Florida ban on CPA solicitation where Board of Accountancy presented neither studies suggesting that personal solicitation created the dangers the Board of Accountancy claimed to fear nor anecdotal evidence validating the Board of Accountancy's suppositions); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-649, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) (striking down restrictions on attorney advertising where "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind").

While a number of courts, including the Supreme Court, have considered the matter of advertising by attorneys and accountants, it appears that few courts have addressed the issue of advertising by dentists. Indeed, after searching both state and federal databases, this court found only one such case, namely *Parker v. Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504 (6th Cir. 1987). In *Parker*, the Sixth Circuit determined that "[a]lthough there are distinctions between the professions of dentistry and law, we do not detect that the description of services performed by dentists is any more inherently or potentially misleading than those performed by lawyers." *Parker*, 818 F.2d at 510. The Sixth Circuit accordingly applied traditional First Amendment commercial speech analysis, as articulated in the attorney advertising cases, in the context of dental advertising.

The Court in *Parker* considered a Kentucky statute that prohibited general dental practitioners from holding themselves out to the public as specialists, or as being "especially qualified," in a particular branch of dentistry. As a general dental practitioner, Stanley Parker ("Parker") was

permitted under Kentucky law to perform services in all recognized branches of dentistry, including orthodontia, but he was nevertheless prohibited from using the words "orthodontics," "braces," "brackets," and similar terms in advertising his services. When Parker in fact placed an advertisement in the Yellow Pages listing, as some of his services, "Orthodontics with Clear & Metal Brackets," and "Orthodontics without Braces," the state Board of Dentistry instituted disciplinary proceedings against him. On appeal, the Board of Dentistry argued that Parker's use of such words as "orthodontics" and "braces" could actually or potentially mislead the general public into believing that he was a "specialist" in the area of orthodontics. The Sixth Circuit, however, found that Parker's advertisement—a truthful description of services that he was permitted under Kentucky law to perform—was *not* inherently misleading. While willing to assume that Parker's advertisement could be potentially misleading, the Sixth Circuit nonetheless concluded that Kentucky's out-right ban on the use of specific, non-deceptive terms could not be justified under the Constitution or Supreme Court precedent.

Like the defendants in *Peel*, *Ibanez*, and *Parker*, the defendants in this case bear a heavy burden to justify the complete ban placed on certain aspects of commercial speech, specifically on the advertisement of a dental practitioner's membership in AAID and credentials awarded by AAID and ABOI/ID. In shouldering their burden, the defendants may not rely on speculation and conjecture but must produce specific evidence to demonstrate that the harms they recite are real and substantial and that the ban "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez*, 512 U.S. at 142, 114 S. Ct. at 2088, 129 L. Ed. 2d at 126. Plaintiffs suggest—and the court agrees—that, given their burden, the defendants have not produced sufficient evidence to survive Plaintiffs' motion for summary judgment.

III.

It is undisputed that Richard A. Borgner ("Borgner") is a credentialed member of the AAID who has been awarded the status of "Fellow" of AAID as well as the status of "Diplomate" of ABOI/ID. Like the credentials at issue in *Peel* and *Ibanez*, Borgner's credentials constitute verifiable facts, as do the predicate requirements for those credentials. The defendants nonetheless seek to distinguish this case from *Peel* and *Ibanez*.

The defendants first state that specialty certifications in dentistry "involve assertions of special expertise on the part of the dentist in scientific fields which are much more esoteric to the average lay consumer of dental services than terms such as 'certified trial lawyer' and 'certified financial planner' are to sophisticated consumers of legal and accounting services." Doc. 61 at 7. Record support for the defendants' conclusory statement, however, is nonexistent. The defendants have cited no studies and have produced no evidence to support their suggestion that consumers of dental services—as opposed to consumers of legal and financial planning services—are more likely to be misled by secondary level certifications. Nor have they explained why, in considering the difference between consumers, they compare the "average lay" dental consumer to the "sophisticated" consumer of legal or financial planning services.

The defendants next suggest that, unlike the state respondents in *Peel* and *Ibanez*, the state defendants in this case have produced "anecdotal" evidence to support their argument that members of the public would be confused if Borgner were permitted to advertise his membership in, and credentialing by, non-ADA, approved organizations. This "anecdotal" evidence consists of the affidavits of (1) Robert T. Ferris, D.D.S., a diplomate of the American Board of Periodontology, a past chairperson of the Florida Board of Dentistry, the president-elect of the Florida Dental

Association, and a past member of the ADA Council on Dental Education/Commission on Dental Accreditation ("ADA Council"); and (2) H. Fred Varn, a past Executive Director of the Florida Board of Dentistry.

As a past Executive Director of the Florida Board of Dentistry, Mr. Varn states in his affidavit that "it is his opinion and belief that a substantial portion of the consumers of dental services in Florida believe that dentists who hold themselves out to the public as 'specialists,' as being 'board certified,' or as limiting their practice to a particular type of practice have in fact obtained specialty certification from the State of Florida or a specialty organization approved by the State of Florida." Doc. 62, Ex. 2 at ¶ 10. The defendants admit, however, that they have no empirical evidence to support Mr. Varn's opinion.

As a dental practitioner whose practice is limited to the ADA-approved specialty of periodontics, Dr. Ferris states in his affidavit that

> it is my opinion that confusion exists among dental consumers concerning the relation between legitimate dental specialties and other dental areas with which the consumer must deal, such as dental practice settings, dental methodologies, and generic areas of dental practice. These other areas should not be equated with—dental specialties because they usually only deal with a technique or an instrument (implants, lasers, etc.) and not with a defined area of health care practice.

Doc. 62, Ex. 1 at ¶ 10. Again, the defendants have not come forward with any empirical evidence to support Dr. Ferris's opinion. They have produced not one bit of anecdotal evidence concerning Dr. Borgner's patients or potential patients, not one report of a complaint or inquiry about his services or his advertisements, not one report of any person's being deceived, misled, or confused by any dentist's AAID or ABOI/ID certifications, and not one document or study to

support the proposition that dental consumers have been misled by any credential issued by any dental accrediting organization in any area of dentistry not recognized by the ADA as a specialty area of dentistry.

As a past member of the ADA Council, Dr. Ferris also states that AAID sought and was denied approval of implant dentistry as a recognized dental specialty from the ADA Council on at least one occasion. Dr. Ferris, a periodontist, says:

> [T]he ADA Council found that AAID failed to meet the Criterion of Recognition which states that the scope of a proposed new specialty cannot readily coincide with the scope of other recognized dental specialties. The ADA Council determined that AAID's proposed specialty in implant dentistry was already being provided adequately by other qualified dental practitioners such as Periodontists, Oral Surgeons, Prosthodontists, and General Dentists. Because these other specialists had been performing the techniques of implant dentistry with-a high level of skill and had gained expertise in the performance of implant dentistry, the ADA Council determined that AAID does not meet this Criterion of Recognition requirement.

Doc. 62, Ex. 1 at ¶ 19. Dr. Ferris does not state that implant dentistry is an illegitimate or unrecognized area of dental practice. He does not state that dentists who are *not* ADA-recognized specialists are unqualified to perform implant dentistry. He does not state that AAID or ABOI/ID is a sham or that either organization awards certifications indiscriminately. In essence, Dr. Ferris says that AAID was denied ADA-recognition as a dental specialty credentialing organization largely because other qualified dental practitioners—including periodontists like himself—are "equally qualified and often more qualified to perform the

same procedures as the dental practitioners AAID wishes to have certified as implant specialists." Doc. 62, Ex. 1 at ¶ 20.

The defendants have fallen woefully short of convincing this court that dental consumers will be misled if Borgner is permitted to advertise both his membership in AAID as well as his credentialed status with AAID and ABOI/ID. While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, they provide no specific evidence that suggests, much less demonstrates, that Borgner's advertisement will create the danger of deception they claim to fear. Given a record devoid of the type of evidence needed for the defendants to survive constitutional review and to successfully rebut the presumption favoring disclosure over concealment, the court finds that Plaintiffs are entitled to summary judgment.

Accordingly, it is ORDERED:

1. Plaintiffs' motion for summary judgment (doc. 49) is GRANTED.

2. Section 466.0282 is DECLARED unconstitutional to the extent it prohibits Borgner from advertising his membership in AAID and his credentialed status in AAID and ABOI/ID, and the defendants are ENJOINED from enforcing section 466.0282 against Borgner for advertising his membership in AAID and his credentialed status in AAID and ABOI/ID.

3. The clerk is directed to enter judgment in Plaintiffs' favor, with costs taxed to the defendants.

WEST'S FLORIDA STATUTES ANNOTATED
TITLE XXXII. REGULATION OF PROFESSIONS AND OCCUPATIONS
CHAPTER 466. DENTISTRY, DENTAL HYGIENE, AND DENTAL LABORATORIES

466.0282. Specialties

(1) A dentist licensed under this chapter may not hold himself or herself out as a specialist, or advertise membership in or specialty recognition by an accrediting organization, unless the dentist:

(a) Has completed a specialty education program approved by the American Dental Association and the Commission on Dental Accreditation and:

1. Is eligible for examination by a national specialty board recognized by the American Dental Association; or

2. Is a diplomate of a national specialty board recognized by the American Dental Association; or

(b) Has continuously held himself or herself out as a specialist since December 31, 1964, in a specialty recognized by the American Dental Association.

(2) A dentist licensed under this chapter may not represent to the public without appropriate disclosure that his or her practice is limited to a specific area of dentistry other than a specialty area of dentistry authorized under subsection (1), unless the dentist has attained membership in or has otherwise been credentialed by an accrediting organization which is recognized by the board as a bona fide organization for such an area of dental practice. In order to be recognized by the board as a bona fide accrediting organization for a specific area of dental practice other than a specialty area of dentistry authorized under subsection (1), the organization must condition membership or credentialing of its members upon all of the following:

(a) Successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is:

1. Beyond the dental degree;

2. At the graduate or postgraduate level; and

3. Of at least 12 months in duration.

(b) Prior didactic training and clinical experience in the specific area of dentistry which is greater than that of other dentists.

(c) Successful completion of oral and written examinations based on psychometric principles.

(3) Notwithstanding the requirements of subsections (1) and (2), a dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the board may announce a practice emphasis in any other area of dental practice if the dentist incorporates in capital letters or some other manner clearly distinguishable from the rest of the announcement, solicitation, or advertisement the following statement: "...(NAME OF ANNOUNCED AREA OF DENTAL PRACTICE)... IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY." If such an area of dental practice is officially recognized by an organization which the dentist desires to acknowledge or otherwise reference in the dentist's announcement, solicitation, or advertisement, the same announcement, solicitation, or advertisement shall also state prominently: "...(NAME OF REFERENCED ORGANIZATION)... IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."

(4) The purpose of this section is to prevent a dentist from advertising without appropriate disclosure membership in an organization which may be perceived by the public as recognizing or accrediting specialization or other unique competencies in an area of dentistry that is not recognized or accredited by the American Dental Association or the board in accordance with this section. The purpose of this section is also to prohibit a dentist from advertising a specialty or other area of dental practice without appropriate disclosure unless the special competencies held by the dentist satisfy the requirements of subsection (1) or subsection (2). The Legislature finds that dental consumers can reasonably rely on these requirements as satisfactory evidence of a dentist's attainment of meaningful competencies in the specialty or other bona fide area of dental practice advertised. The Legislature also finds that this process for the recognition of dental specialties and other bona fide areas of dental practice is the least restrictive means available to ensure that consumers are not misled about a dentist's unique credentials.

Supreme Court, U.S.
FILED
OCT 1 4 '02

No. 02-165

IN THE

Supreme Court of the United States

RICHARD A. BORGNER and
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY
and JOHN O. AGWUNOBI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE FLORIDA BOARD OF DENTISTRY

BARRY RICHARD
Counsel of Record
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(850) 681-0207

ELLIOT B. KULA
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Respondent
The Florida Board of Dentistry

i76839

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Section 466.0282, Florida Statutes (1999), allows Florida-licensed dentists to advertise credentials from organizations and specialty practices not approved by either the American Dental Association or the Florida Board of Dentistry, subject to a modest disclaimer to that effect. The earlier version of this statute prohibited such advertising altogether, but was found to be an unconstitutional infringement on commercial speech. The Florida Legislature was then prompted to enact the 1999 amendments, which amendments were intended to comply with this Court's repeatedly stated preference for disclaimers rather than outright prohibitions on speech when regulating potentially misleading advertising. *E.g.*, *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977).

The question presented is:

Whether the disclosure provision of Section 466.0282, Florida Statutes (1999), requiring Florida-licensed dentists to include a disclaimer when advertising professional credentials from dental organizations and specialty practices not recognized by the American Dental Association or The Florida Board of Dentistry, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Petition	4
I. The Standard Governing Disclaimers Is Well-Established.	4
II. Petitioners Present No Case For Review.	10
Conclusion	18

TABLE OF CITED AUTHORITIES

Cases:	Page
Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992)	3, 13, 14
Bates v. State Bar of Ariz., 433 U.S. 350 (1977)	i, 4
Bingham v. Hamilton, 100 F. Supp. 2d 1233 (E.D. Cal. 2000)	3
Board of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)	5
Borgner v. Cook, 33 F. Supp. 2d 1327 (N.D. Fla. 1998)	1, 16
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)	*passim*
Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)	5, 9, 10, 13, 15
Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994)	3, 6, 9, 10
Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000)	12, 13
Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990)	i, 3, 6, 8, 9

Cited Authorities

	Page
In re R.M.J., 455 U.S. 191 (1982)	6, 7
State ex rel. Greenberg v. State Bd. of Dentistry, 297 So. 2d 628 (Fla. 1st DCA), *cert dismissed*, 300 So. 2d 900 (Fla. 1974)	14-15
Strang v. Satz, 884 F. Supp. 504 (S.D. Fla. 1995)	15
Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918)	15
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	4
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	*passim*
United States Constitution:	
First Amendment	i, 4, 6, 12
Fourteenth Amendment	i
Statutes:	
§ 466.004, Fla. Stat. (2001)	1, 14
§ 466.0282, Fla. Stat. (1999)	i, 1, 2, 4
§ 466.0282, Fla. Stat. (2001)	15
§ 466.0282(3), Fla. Stat. (1999)	1
§ 446.0282(4), Fla. Stat. (1999)	1

Respondent, the Florida Board of Dentistry, respectfully requests this Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Richard A. Borgner ("Borgner") is a Florida-licensed dentist who practices general dentistry, and advertises himself as a member of the American Academy of Implant Dentistry ("the AAID"), a "Fellow" of the AAID and a "Diplomate" of the American Board of Oral Implantology/Implant Dentistry ("the ABOI/ID"). (App. 2a; 26a-27a). Borgner and the AAID filed a complaint in the District Court for the Northern District of Florida challenging the constitutionality of the disclaimer provision set out in Section 466.0282(3), Florida Statutes (1999), which provision requires Florida-licensed dentists to include a modest disclaimer when advertising a credential or specialty practice that is approved by an accrediting organization other than the American Dental Association ("the ADA") or the Florida Board of Dentistry ("the Board"). (App. 1a-3a; 61a).[1] The amended statute includes as well, explicit findings of fact which establish the necessity for the disclaimer provision amendment and an express statement of legislative purpose. § 446.0282(4), Fla. Stat. (1999). (App. 61a).[2]

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1. The Board is the State's statutorily created licensing board, and it is responsible for enforcing the provisions of the Florida Statutes which regulate Florida's dental industry. § 466.004, Fla. Stat. (2001).

2. In its earlier version, Section 466.0282 completely prohibited Florida-licensed dentists from advertising specialty practices or credentials from any accrediting organization not recognized by the State (*i.e.*, either the Board or the ADA, as the State's designee), and Borgner successfully challenged the statute's constitutionality. *Borgner v. Cook*, 33 F. Supp. 2d 1327 (N.D. Fla. 1998). (App. 2a; 46a-58a).

The district court granted summary judgment in favor of Borgner and the AAID, and declared the statute unconstitutional "to the extent it prohibits Dr. Borgner from advertising membership in the AAID and his credentialed status in the AAID and ABOI/ID" and "to the extent that it prohibits Dr. Borgner from either representing to the public that his practice is limited to implant dentistry or announcing a practice emphasis in implant dentistry without also incorporating a disclosure statement." (App. 45a).

The Eleventh Circuit reversed the summary judgment and declared the statute constitutional (App. 18a), emphasizing at the outset that the statute "clearly permits advertisement . . . so long as these statements are accompanied by the appropriate disclaimers." (App. 7a).

The court applied the "four-step process for assessing the constitutionality of a restriction on commercial speech" (App. 7a), announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), recognizing that: (i) there is a distinction drawn between "potentially" and "inherently" misleading advertising (App. 8a); (ii) "Florida's desire to regulate dentists' advertisements" and its interest in " 'protecting its citizens from unqualified and incompetent health care professionals' is certainly valid" (App. 8a-9a); (iii) Florida "is justified in regulating commercial speech in this area in such a way that information (*i.e.*, disclaimers in advertisements) is quickly available to consumers so that they might be able to make an informed decision in selecting a dental professional" (App. 13a); and (iv) the disclaimer provision in Section 466.0282, particularly when compared to the previous outright prohibition on advertising, is no more extensive than necessary to serve Florida's interest in "protecting its citizens

from unqualified and incompetent health care professionals, and establishing standards and uniform criteria for the certification of its licensed dentists." (App. 14a).

The court observed, consistent with this Court's precedent, that:

> Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech.

Id. (citing *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110-11 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992); *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1241 (E.D. Cal. 2000)).[3]

The court accordingly held that, "based on the record in this case . . . and Supreme Court and our circuit precedent recommending disclaimers as an alternative to outright prohibitions on commercial speech," the disclaimer

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3. The court rejected Borgner's reliance on *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994), because in that case, unlike here, there was no evidence of a harm that is "potentially real" and because the disclaimer provision in that case required not only a statement that the recognizing agency is not affiliated with or sanctioned by the state or federal government, but also a recitation of the agency's requirements for recognition. (App. 16a-17a).

requirements in Section 466.0282 are "not . . . especially long or burdensome, but simply an effective manner to convey necessary information to the public." (App. 17a).

REASONS FOR DENYING THE PETITION

I. The Standard Governing Disclaimers Is Well-Established.

In *Central Hudson*, the Court adopted a four-part analysis for determining the constitutionality of restrictions imposed on commercial speech, as follows: (i) whether "the communication is neither misleading nor related to unlawful activity," so that it is subject to First Amendment protection in the first instance; (ii) whether there is a "substantial interest to be achieved"; (iii) whether the regulation "directly advance[s] the [governmental] interest involved"; and (iv) whether the governmental interest "could be served as well by a more limited restriction." 447 U.S. at 564.

Significantly, in its final analysis, the Court suggested in *Central Hudson* that requiring additional information and disclosure in advertising, rather than speech suppression, is the preferred regulatory technique. *Id.* at 570-71.[4]

4. Even earlier, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court expressed its preference for disclaimers over outright prohibitions on potentially misleading commercial speech, observing that, because commercial speech is "the *Sine qua non* of commercial profits, there is little likelihood of it being chilled by proper regulation." *Id.* at 772 n.24. *Accord Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (recognizing that it is a "clearly permissible limitation[] on advertising" to require "some limited supplementation, by way of warning or disclaimer or the like, . . . to assure that the consumer is not misled").

In *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), the Court redefined part four of the *Central Hudson* test when it expressly rejected the least-restrictive-means test in favor of a considerably more liberal one, announcing:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends, — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.

Id. at 480 (internal quotations and citations omitted).[5] *Accord Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) ("In *Fox*, we made clear that the 'least restrictive means' test has no role in the commercial speech context."); *Zauderer*, 471 U.S. at 651 n.14 ("Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized.").

5. The Court in *Fox* furthermore stated that it was best to "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

In virtually every case since *Central Hudson*, in which the Court has invalidated prohibitions on professional advertising, the Court has made a point of noting that the requirement of a disclaimer is a preferable alternative when the objective is to avoid potential confusion, because it promotes greater disclosure of information. *E.g.*, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-47 (1994) (striking a disclaimer provision due to a lack of evidence suggesting any harm that is "potentially real" and a finding that the disclaimer is overly burdensome, but stating that the Court "express[es] no opinion whether, in other situations or on a different record, the . . . insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion"); *Peel*, 496 U.S. at 110 ("To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider . . . requiring a disclaimer about the certifying organizations or the standards of a specialty."); *Zauderer*, 471 U.S. at 651 ("[I]n virtually all our commercial speech decisions . . . we have emphasized that . . . warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusions or deception."); *In re R.M.J.*, 455 U.S. 191, 201 (1982) ("[T]he preferred remedy is more disclosure, rather than less.").

In *In re R.M.J.*, in an unanimous decision, the Court reviewed state disciplinary rules regulating attorney advertising and in its holding that potentially misleading advertising deserves some First Amendment protection appears to have redefined the scope of that protection, at least in the professional advertising context, as follows:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment.

> But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but *preferably a requirement of disclaimers or explanation*. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

455 U.S. at 203 (citation omitted; emphasis added).

In *Zauderer*, the Court reviewed a provision requiring that attorneys who advertise their availability to represent plaintiffs on a contingency basis must disclose that clients will have to pay costs even if their lawsuits are unsuccessful. 471 U.S. at 650. Zauderer's advertisement made no mention of this possible outcome and the Court observed that "to a layman" unaware of the distinction between legal fees and legal costs, the absence of a disclosure explaining such a distinction might suggest to the unsuspecting plaintiffs that hiring the attorney would be "a no-lose proposition." *Id.* at 652.

The Court thus upheld the disclaimer provision in *Zauderer*, stating:

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.

Id. at 651 (citations omitted). The constitutional compromise that is struck by the resort to a disclaimer was not advanced lightly, however. The Court cautioned:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Id.

The same rational appears to underpin the Court's decision in *Peel*. The Court there reviewed the public censure of an attorney who identified himself in his letterhead as a civil trial specialist certified by the National Board of Trial Advocacy, a private organization endorsed by several states, but not Illinois. 496 U.S. at 95-96. The Court recognized the

valid governmental interest in avoiding any potential that the attorney's representation might mislead consumers, but found such interest was insufficient to justify a categorical ban on the commercial speech. *Id.* at 110. The Court encouraged disclaimer requirements as a preferable resort:

> To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider . . . requiring a disclaimer about the certifying organization or the standards of a specialty.

Id.

Finally, and most recently, in *Ibanez*, the Court invalidated a provision which prohibited an attorney, who was also a certified public accountant ("CPA") and certified financial planner ("CFP"), from including such designations on her letterhead, business cards, and advertisements. 512 U.S. at 138-39. The Court applied the *Central Hudson* test, which it characterized as requiring a showing that "the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* at 142. The Court thus invoked the "no more extensive than necessary" language instead of the "reasonable fit" gloss on part four, demonstrating its intent to subject commercial speech regulations to a more searching scrutiny under parts three and four of *Central Hudson*. *Id.*[6]

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6. Giving further precision to the applicable level of scrutiny, in *Florida Bar*, the Court held that:

> [B]ecause the standards and conduct of state-licensed [professionals] have traditionally been subject to

(Cont'd)

The Court invalidated both disclaimer requirements, noting that there was a lack of record evidence of a harm that is "potentially real" (*id.* at 146), which defeated the state's attempt to overcome the "constitutional presumption favoring disclosure over concealment" (*id.* at 145), and that the disclaimer requirements were overly burdensome. *Id.* at 146-47.[7] The Court clarified the applicable analysis by announcing that required disclosures and disclaimers must themselves meet *Central Hudson*, enhancing the mere "reasonableness" test approved by the majority opinion in *Zauderer*. *Id.* at 142-43, 146.

II. Petitioners Present No Case For Review.

Petitioners essentially advance two grounds upon which they suggest that the Court should grant certiorari review: (i) there is a need for greater clarity and precision regarding the constitutional analysis applicable to disclaimer

(Cont'd)

> extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the subordinate position of commercial speech in the scale of First Amendment values.

515 U.S. at 635 (internal quotations omitted).

7. Justice O'Connor, joined by Chief Justice Rehnquist, considered Ibanez's use of "CFP" both inherently and potentially misleading, and thus dissented from the Court's opinion concerning use of the "CFP" designation. *Id.* at 149. Justice O'Connor would have held that the state, although unable to ban the use of "CFP" completely, might at least require disclosure about the certifying organization and its standards, and a statement disclaiming affiliation with the state. *Id.* at 152-53.

requirements versus speech prohibitions; and (ii) there is a purported "trend" afoot toward the application of an "exceedingly relaxed scrutiny to commercial-speech disclaimers" such that it has become a regulation of first resort rather than last resort. (Petition at 11). Neither ground supports a case for review.

Petitioners fail to give due recognition to the many decisions of this Court since *Central Hudson*, as set out above, which provide an unequivocal framework for analyzing the constitutionality of disclaimer provisions. Discounting the jurisprudence developed on this issue, Petitioners contend that the Court has not established a standard for assessing the constitutionality of disclaimers, that there has been no statement of the findings necessary to support a disclaimer, and that there is no precise standard for the means-end analysis. Respectfully, this contention reflects more on Petitioners' dissatisfaction with the state of the law then on a purported need for a clearer statement of the applicable constitutional analysis. It is readily seen that Petitioners actually are seeking to undo the well-established jurisprudence pertaining to the regulation of commercial speech which has encouraged the disclaimers as the preferred resort.

The suggestion by Petitioners that the Eleventh Circuit's decision marks a "trend" toward the application of an "exceedingly relaxed scrutiny to commercial-speech disclaimers" drawn from the "bookend" propositions that disclaimers are preferable to outright bans and that they prevent advertising from being potentially misleading (Petition at 11-12), is unfounded. Simply, no such trend is apparent.

Petitioners offer a laundry list of cases in which federal and state courts have upheld disclaimer requirements. (Petition at 23-24). This listing of cases provides no meaningful consideration of the underlying analysis supporting the result obtained in each instance, however. That disclaimers were upheld in each case simply does not demonstrate a departure from the constitutional analysis established by this Court, as set out above, nor does it demonstrate any purported trend.

Recent Eleventh Circuit cases illustrate that, far from Petitioners' suggestion, the First Amendment has been carefully guarded to the point of unduly restricting disclaimer provisions in some instances.

In *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), the Eleventh Circuit struck a disclaimer requirement imposed by the Florida Bar. Mason included in his advertisements the representation that he is " 'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory." *Id.* at 954. The Bar required that an advertisement containing the representation also include a disclaimer stating that Martindale-Hubbell ratings are based upon confidential information and that not all lawyers are rated. *Id.* Citing many of this Court's major decisions on professional advertising, the court held that requiring such a disclaimer would be an unconstitutional restriction on Mason's freedom of commercial speech. *Id.* at 955, 958. The court was notably persuaded that the Bar had "presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public." *Id.* at 957.

It is arguable that the Eleventh Circuit in *Mason* went beyond the lines drawn by this Court. In *Zauderer*, the Court noted that it is not necessary for a state to conduct a survey when the possibility of misleading the public is self-evident.[8] It is not unreasonable to conclude that an unsophisticated member of the public reading the phrase "highest rating" could conclude that all attorneys are rated and that the ratings are based on objective, verifiable criteria. Contrary to the Petitioners' assertion regarding the purported "trend," the Eleventh Circuit's decision in *Mason* is, if anything, an unduly *restrictive* application of the principles set forth by this Court.

In *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992), the Eleventh Circuit struck a statutory provision prohibiting an unlicensed individual from advertising as a "psychologist." The court held that Florida could not impose such a restriction on commercial speech because Florida law does not require a

8. In *Zauderer*, emphasizing the "material differences between disclosure requirements and outright prohibitions on speech," 471 U.S. at 650, the Court concluded that, "[w]hen the possibility of deception is self-evident . . . , we need not require the State to conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." *Id.* at 652-53 (internal quotations and citations omitted). To the same effect is *Florida Bar*, in which the court explained:

> [W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales . . . or . . . based solely on history, consensus, and "simple common sense."

515 U.S. at 628 (citations omitted).

license to practice psychology. *Id.* at 1578. Adhering precisely to this Court's precedent, the court then suggested that resort to a disclaimer would be a constitutional alternative; it would be minimally restrictive while sufficient to cure the potential deception and ultimately serving the State's interest. The Eleventh Circuit stated in support:

> Admittedly, some danger exists that the public will be misled if the plaintiffs are permitted to hold themselves out as psychologists. Yet, when the first amendment is at issue, the preferred remedy is more disclosure, rather than less. *Peel* and earlier cases have described various regulatory safeguards which the state may impose in place of the total ban on commercial speech now in effect.
>
> The first amendment dictates that commercial speech not false or inherently misleading may be regulated, but may not be banned. . . . To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information.

Id. at 1577 (internal quotations and citations omitted).

Certainly in this case, the Eleventh Circuit adhered to the well-established standard. The Florida Legislature created the Board of Dentistry by statute and delegated to it the authority to oversee and police Florida's dental industry and its licensed practitioners. § 466.004, Fla. Stat. (2001). *See, e.g., State ex rel. Greenberg v. State Bd. of Dentistry*, 297 So. 2d 628, 636 (Fla. 1st DCA), *cert dismissed*, 300 So. 2d 900 (Fla. 1974).[9] The Board, in particular, is statutorily authorized, based on the ADA's findings as well, to identify those specialty practice areas and credentialing organizations that meet the State's minimum standards for such recognition. § 466.0282, Fla. Stat. (2001). There is every reason to believe, therefore, that specialty status is sanctioned by the State, through the Board and the ADA as its designee. Advertisements without the disclaimer would self-evidently be misleading, and the surveys confirmed this.[10] Petitioners simply fail to appreciate the distinction

9. Florida has a substantial interest in restricting the commercial speech of its licensed health care professionals, in an effort to "protect[] its citizens from unqualified and incompetent health care professionals," and "has broad police powers to regulate for the health and safety of its citizens." *Strang v. Satz*, 884 F. Supp. 504, 508 (S.D. Fla. 1995). *See, e.g., Van Pelt v. Hilliard*, 78 So. 693, 697 (Fla. 1918) (holding that legislative discretion in classifying the subjects of police regulation will not be disturbed by the courts unless it is wholly without a reasonable basis). Indeed, this Court has recognized:

> States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

Florida Bar, 515 U.S. at 625 (citation omitted).

10. The Eleventh Circuit determined:

> [T]hrough the[] surveys [submitted to the district court], the state has demonstrated the actual harm that could come from Borgner's proposed advertisements that do not include disclaimers. Without a disclaimer, consumers are led into thinking implant dentistry is a state-

(Cont'd)

between a credentialing organization that is "bona fide" and one which is authorized to designate a specialty practice. There must be some leeway so that the Board's authority is given some meaning.

The Eleventh Circuit's decision in this case was entirely rational, and reflects a consistent application of constitutional analysis enunciated by this Court. Florida has determined that it is in its citizens' best interest if the Board and the ADA are the officially designated and approved organizations responsible for determining the standards and criteria for specialty practice recognition and credentialing. A Florida-licensed dentist may publish a specialty practice or credential approved by another non-recognized accrediting organization, but the public must be informed of that qualifying fact. The State has a substantial interest in preserving the integrity of its professional dental practice and to establish standards and uniform criteria.

The constitutionality of a disclaimer ultimately must be measured by weighing the burden on the advertiser against the benefit to the public. The burden on Florida-licensed dentists resulting from the disclaimer provision in Section 466.0282 is insignificant on balance against the potentiality

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(Cont'd)

> recognized specialty and that AAID and ABOI/ID enjoy state approval, when in reality, they do not. The state has also shown that its disclaimer requirements will alleviate this harm because providing disclaimers will help consumers make better, more informed decisions about whom they select as their general or specialized dentist.

Borgner v. Brooks, 284 F.3d 1204, 1213 (11th Cir. 2002). (App. 13a).

that the public will be misled to believe that their choice in a dentist, based on advertised qualifications, is substantiated by the State's endorsement.[11] In the end, it is readily seen that Petitioners have overstated the import of what is nothing more then their dissatisfaction with the outcome of this particular case.

It is simply counterintuitive to suggest that a great many cases are resulting in decision upholding disclaimer requirements and that such a "trend" reflects the application of an "exceedingly relaxed scrutiny" which this Court should revisit. To the contrary, these decisions demonstrate that there is, across the board, no confusion regarding the applicable analysis for determining the constitutionality of commercial speech regulation, as developed by this Court. The issue presented by Petitioners does not warrant consideration.

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11. Petitioners contend that significance should be given to the fact that the disclaimer here at issue is a "scripted disclaimer." (Petition at 11, 18). The suggest is unfounded, and fails to appreciate that disclaimers by nature are scripted. Neither is there any basis for the Petitioners' contention that significance should be given to the fact that a business card will not accommodate the disclaimer. (Petition at 22). The size of the advertisement or its placement (*e.g.*, embossed on a pen) does not control the constitutional analysis.

CONCLUSION

Respondent, The Florida Board of Dentistry, respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BARRY RICHARD
Counsel of Record
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(850) 681-0207

ELLIOT B. KULA
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Respondent
The Florida Board of Dentistry

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IN THE

Supreme Court of the United States

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY
AND JOHN O. AGWUNOBI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

FRANK R. RECKER
NANCY A. SCHELL
FRANK R. RECKER & ASSOCIATES, CO., L.P.A.
267 N. Collier Blvd.
Suite 202
Marco Island, FL 34145
(239) 642-4704

MARILYN J. MARSHALL
254 East Sixth Ave.
Tallahassee, FL 32303
(850) 561-0707

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
MICHAEL Y. SCUDDER
JONES, DAY, REAVIS & POGUE
41 South High Street
Suite 1900
Columbus, OH 43215
(614) 469-3855

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONERS 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

Borgner v. Cook, 33 F. Supp. 2d 1327 (N.D. Fla. 1998) 5

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) ... 2, 4, 5, 7

Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994) 4, 5

Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) 4

Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988) 6

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 5

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) 3, 4

REPLY BRIEF FOR PETITIONERS

In their brief in opposition, respondents opt for silence rather than speech in addressing many of the issues raised by the petition. They do not deny that the Court has had few, if any, opportunities to clarify the appropriate standard for reviewing government-compelled and government-scripted speech disclaimers. They do not deny that only the most eccentric commercial speaker would be willing to include the disclaimer required in this case, one that forces dentists to say that their educational credentials come from organizations that are "not . . . bona fide." They do not deny that Florida dentists in fact have been unwilling to communicate with consumers about their educational credentials and expertise on these terms. They do not deny that this requirement is not only burdensome but also misleading—because one of the respondents, the Florida Board of Dentistry, previously found that "the AAID and the ABOI/ID are bona fide organizations." Pet. App. 48a (quotation omitted). And they do not deny the glaring reality that the Florida Attorney General has in the words of the district court "declin[ed]" to defend them in this case. *See* Pet. App. 26a n.1.

What respondents do say in answering the petition is no more helpful to their cause. For these reasons, those offered in the petition, and those added below, the writ should be granted.

1. Respondents initially make a fainthearted attempt to contest the severity of the disclaimer requirement. In their rephrasing of the question presented and on the first page of their brief, they submit (Br. i, 1) that the Florida law merely imposes "a *modest* disclaimer" requirement on dentists like Dr. Borgner. (Emphasis added.) No explanation has been given for this characterization of the law, and none would seem to exist. What individual would be willing to publicize affiliation with an organization that must be characterized as "not . . . bona fide"? And who would do so when the disclaimer must appear in capital letters (or their equivalent)? To our knowledge, no dentist has been willing to pay such a

steep price to tell the public about their educational qualifications and expertise. And so long as the point of advertising is to increase rather than diminish one's customer base, it is difficult to envision any commercial speaker who ever would communicate with the public on these terms. If this is "modesty," in short, one can only imagine the Florida Board of Dentistry's view of extravagance.

2. Respondents next devote a considerable number of words (Br. 4; *see id.* 4-10) to arguing that the Court often has stated a preference for "requiring . . . disclosure in advertising, rather than speech suppression." Yet this argument does not contradict the petition; it echoes one of the essential points made in it. Yes, as the petition explains (Pet. 14-17), the Court frequently has acknowledged the First Amendment's preference for more information rather than less. But the point of detailing the Court's decisions on this issue was to explain that they do not establish the necessary predicate for two components of the lower-court analysis—(1) that all commercial-speech disclosure requirements are presumptively constitutional and (2) that general information-based disclosure requirements warrant the same kind of constitutional scrutiny as state-scripted disclaimer requirements that diminish credibility rather than explain a product's attributes. Indeed, one of the central premises of the petition is that the Court's frequently-stated *dicta* that more speech is preferable to less speech has caused lower courts to give unduly lax scrutiny to disclaimer requirements.

And that is exactly what happened here. So forgiving was the Eleventh Circuit's application of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), that the court upheld a disclaimer requirement that in application operates no differently from a law establishing content-based speech suppression about dentists' educational credentials and about their expertise. Consider just two examples of the lower court's thinking on this point, both of

them quoted in full (Br. 3-4) in respondents' brief in opposition. In one, the court said:

> Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total an on commercial speech.

Pet. App. 14a. In the other, the court suggested that the Florida disclaimer at issue here is "not . . . especially long or burdensome, but simply an effective manner to convey necessary information to the public." Pet. App. 17a.

In the first and final analysis, these statements do not accord with reality. By any measure, Florida's disclaimer requirement has operated as a speech ban—as every indicator of common sense would expect and as all experience under the law has proved. When the repetition of Court *dicta* that speech disclosure is preferable to speech suppression leads to the upholding of a law that operates to silence commercial speech on the basis of its content, the question that arises is not simply one of lower court error. It is also whether the appropriate test for reviewing speech disclosure requirements is being used and whether that test has become too vulnerable to the type of interest-group capture that apparently occurred here. As the facts of this case well illustrate, in other words, the lower court's conversion of *dicta* about speech disclosure into an iron-clad presumption of constitutionality presents additional reasons to review the Florida law, not a reason to allow it to remain on the books.

3. Matters do not improve when respondents turn (Br. 7-8) to *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)—the one holding of the Court that sustains a disclosure requirement. In that case, the record established that contingency-fee advertisements left the impression that the client would not have to pay *any* money

(including costs) for the offered legal services. *Id.* at 652-53. In response, Ohio required attorneys advertising such fee arrangements to explain more fully how they worked. Unlike Florida, however, Ohio did not script a disclaimer; it did not require the disclaimer to appear in capital letters; and it did not require the attorney to stress to potential clients that the fee arrangement was "not . . . bona fide."

Properly read, *Zauderer* illustrates when a disclosure is both warranted and valid. As shown in the petition (25-26), the key problem with the *Zauderer* contingency-fee advertisements was that they were misleading as written. In that setting, commercial speech receives no First Amendment protection, *Central Hudson*, 447 U.S. at 566, and a disclosure requirement accordingly ought to receive a heavy, if not an irrebuttable, presumption of constitutionality. That lesson, however, has no application to truthful speech about a legitimate and established organization, which is the only kind of speech Dr. Borgner asked to communicate to consumers here.

4. In addition to failing to explain why *Zauderer* supports the validity of a disclaimer requirement imposed with respect to truthful, non-misleading speech, respondents fail to explain how the Eleventh Circuit's decision is consistent with *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), and *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994). To be sure, respondents briefly discuss (Br. 8-10) both decisions. But they nowhere explain how the Eleventh Circuit's diluted scrutiny of the Florida disclaimer adheres to the analysis of those two cases or to the results in them. Indeed, if the approach of *Peel* or *Ibanez* were employed here, any risk of confusion could be removed by the consumer's ability to "verify [Borgner's] credential"—either by calling AAID or by asking Dr. Borgner himself. *Ibanez*, 512 U.S. at 145 n.9. If that lesser alternative sufficed in *Ibanez* and *Peel*, both of

which did not involve a "not . . . bona fide" disclaimer requirement, it surely ought to suffice here.

5. Nor do respondents explain how the record evidence in this case satisfies even the most modest version of *Central Hudson* scrutiny. In particular, no evidence supports the notion that consumers need a "not . . . bona fide" disclaimer to avoid being misled by a dentist who advertises that he has been credentialed by AAID. Not only has Florida failed to "point to any harm that is potentially real, not purely hypothetical" with respect to the need for this onerous requirement, *Ibanez*, 512 U.S. at 146, but it also is difficult to imagine how such evidence ever could be compiled. *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (evidentiary burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree") (quotation omitted).

That is particularly true in this instance. The record already establishes that the same agency that is implementing this law—respondent, the Florida Board of Dentistry—previously concluded that "the AAID and the ABOI/ID are bona fide organizations." Pet. App. 48a (quotation omitted). And the district court previously reached the same conclusion. *See* Pet. 4 (citing *Borgner v. Cook*, 33 F. Supp. 2d 1327, 1333 (N.D. Fla. 1998) (*Borgner I*)). First Amendment challenges rarely come to the Court pre-packaged with such evidence, which in this instance is as pertinent as it is uncontradicted.

6. Respondents do not answer Dr. Borgner's argument (Pet. 12-14) that the 2-1 decision of the Eleventh Circuit not only is inconsistent with *Central Hudson* but also fails to respect other free-speech first principles. In engrafting onto the First Amendment a casual standard of review for government-compelled and government-scripted speech disclaimers, the lower court lost sight of the language of the

amendment and of other decisions interpreting it. As a matter of constitutional language, the First Amendment protects a citizen's "freedom of speech," a phrase that necessarily covers "both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988). And as a matter of precedent, the Court frequently has given exacting scrutiny to compelled-speech requirements because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795. *See also* Pet. 13-14 (citing other cases). Respondents offer no explanation how the lower-court's decision respects these time-honored principles or can be reconciled with them.

7. Respondents also do not respond to the two brief *amici curiae* offered in support of the petition, both of which were filed long before respondents submitted their brief in opposition. As to the brief of The American Academy of Cosmetic Dentistry, respondents do not counter these contentions: (1) the Florida law "harms consumers because, as a practical matter, it puts an end to the certification of dentists in Florida by non-state sanctioned organizations," Br. 2; (2) the injury to consumers "is accomplished by a *de facto* ban on certain kinds of speech," *id.*; (3) "[w]ithout . . . guidance" from the Court, decisions like the Eleventh Circuit's "put at risk the ability of legitimate organizations . . . to award professional credentials," *id.* at 3; and (4) laws like this one "harm[] consumers" by "rais[ing] their search costs and . . . reduc[ing] the investments professionals will make to acquire expertise," *id.* at 6. As to the brief by The American Board of Implantology/Implant Dentistry, respondents do not counter these contentions: (1) the Florida surveys relied on by the Eleventh Circuit did not ask the most pertinent questions raised by this law—namely, consumers' "perceptions of the scripted disclaimer" or whether a "less burdensome approach than having a dentist state that his or her certification was not BONA FIDE might satisfy the State of Florida's concerns,"

Br. 8.; and (2) the time has come to resolve this issue—as the State of Florida "has prohibited ABOI/ID diplomates from communicating their qualifications to the public since 1996," Br. 10.

8. Nor do respondents argue or even suggest that this case presents a poor vehicle for reviewing the issue. At no point, for instance, do respondents raise a jurisdictional impediment to reviewing the question presented. A final, appealable order is in place, and there is no independent and adequate state ground precluding review. Nor have respondents claimed that any arguments made by the petitioners have been waived. And the absence of a circuit split, say, of the type one would find in a statutory-interpretation case, is of no moment. It would be quite unusual to find two States with the same disclaimer scheme. So too would it be unusual to see a lower court assess a disclaimer statute without reference to *Central Hudson*. The unalterable reality is that this Court has not yet enjoyed the opportunity to explicate fully the standards governing these kinds of disclaimers. In the end, whether one supports the *Central Hudson* test or disapproves of it, lower courts and litigants alike need guidance from this Court regarding the appropriate standard for assessing government-compelled and government-scripted disclaimers in the commercial-speech arena. This case presents an ideal vehicle for doing so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

FRANK R. RECKER
NANCY A. SCHELL
FRANK R. RECKER & ASSOCIATES, CO., L.P.A.
267 N. Collier Blvd.
Suite 202
Marco Island, FL 34145
(239) 642-4704

MARILYN J. MARSHALL
254 East Sixth Ave.
Tallahassee, FL 32303
(850) 561-0707

JEFFREY S. SUTTON
Counsel of Record
BRIAN G. SELDEN
MICHAEL Y. SCUDDER
JONES, DAY, REAVIS & POGUE
41 South High Street
Suite 1900
Columbus, OH 43215
(614) 469-3855

Counsel for Petitioners

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IN THE

Supreme Court of the United States

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY,
AND JOHN O. AGWUNOBI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN BOARD OF IMPLANTOLOGY/IMPLANT DENTISTRY IN SUPPORT OF THE PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

THOMAS H. BOERSCHINGER
Counsel of Record
ALAN O. AMOS & ASSOCIATES, P.C.
180 N. LaSalle Street
Suite 3150
Chicago, Illinois 60601
(312) 419-1300

Counsel for Amicus Curiae American Board of Implantology/ Implant Dentistry

15 pp

QUESTION PRESENTED

Amicus addresses the following questions:

Whether the Florida Board of Dentistry (or any state board regulating professional services) may accomplish its stated purpose of protecting consumers from confusion regarding certification of a professional that is approved by the state vis-à-vis certification by an independent certification board by requiring advertisements announcing the independent certification to be accompanied by a scripted disclaimer that is both inaccurate and demeaning.

Does the "disclaimer" required by the Florida legislation interfere with the public's right to information that assists in choosing professional services?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

ARGUMENT 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) 5, 6

Edenfeld v. Fane, 507 U.S. 761 (1995) 10

Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994) 9

NAACP v. Button, 371 U.S. 415 (1963) 10

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 6

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 5

Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1946) 9

Watson v. City of Memphis, 373 U.S. 526 (1963) 10

Statutes

Fla. Stat. § 466.0282(1) 8

Fla. Stat. § 466.0282(2) 8

Fla. Stat. § 466.0282(3) 5

Miscellaneous Authorities

Webster's Ninth New Collegiate Dictionary (1986) 5

INTEREST OF THE AMICUS*

The American Board of Implantology/Implant Dentistry ("ABOI/ID") is an independent certification board chartered under the General Not-For-Profit Corporation Act of the State of Illinois. Its mission is to elevate the standards and advance the science and art of implant dentistry by encouraging its study and improving its practice. To this end, the ABOI/ID conducts examinations to determine the qualifications and competence of dentists who voluntarily apply to the ABOI/ID for certification as diplomates.

Implant dentistry involves the replacement of missing or defective teeth by surgically implanting devices in the jaw to which prosthetics, that include everything from a single artificial tooth to complete dentures, can be firmly, and are often permanently, attached. As such, when an existing tooth or teeth cannot be restored, or are missing, implant dentistry constitutes the current state of the art for artificial restorations that most closely duplicates the function and appearance of natural teeth. Because implant dentistry involves surgery of the jaw and gums, and construction of the prosthetic device, it involves various aspects of the recognized dental specialties of oral surgery, periodontics and prosthodontics.

The ADA does not recognize the field of implant dentistry as a specialty of dental practice. Accordingly, the ABOI/ID does not have ADA recognition as a specialty certifying board. However, the ABOI/ID Bylaws provide that in fulfilling its purpose and objectives it will be guided by the ADA's Requirements for National Certifying Boards for Dental Specialties.

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* The consents of the parties to the filing of this amicus brief are on file with the clerk. No counsel for a party authored any part of this brief. No monetary contribution to the preparation and submission of this brief was made by anyone other than the ABOI/ID.

The ABOI/ID is sponsored by the American Academy of Implant Dentistry ("AAID"), one of the petitioners in this case. The ADA's Requirements for National Certifying Boards for Dental Specialties require that a dental certifying board have such a sponsorship. For example, the American Board of Oral and Maxillofacial Surgeons, the certifying agency for the ADA recognized specialty of oral surgery, is sponsored by the American Association of Oral and Maxillofacial Surgeons, an ADA affiliate organization. The affairs of the ABOI/ID, including the examination process, exam construction and the qualifications of applicants for certification are conducted by the ABOI/ID Board of Directors who are elected by the Board's diplomates. The Board members receive no remuneration other than reimbursement of actual expenses.

The ABOI/ID has a direct stake in the outcome of this case. To obtain certification as an ABOI/ID diplomate a dentist must document advanced education and experience, undergo a review of cases he or she has treated and pass a rigorous oral and written examination that is based on psychometric principles.

The ABOI/ID has five routes by which an applicant may qualify to take its diplomate examinations:

1. a. *Education:* Graduation from a full-time postdoctoral program in oral implantology/implant dentistry that is at least two years in length. The program must be sponsored by an institution that is properly chartered and licensed to operate and offer instruction leading to degrees, diplomas or certificates with recognized educational validity (i.e., a dental school accredited by the Commission on Dental Accreditation of the ADA or a hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations.)

   b. *Experience:* At least five years of clinical practice in implant dentistry, including the advanced education program.

   c. *Cases:* Ten arches of implant treatment. (A treated arch means that one or more implants were placed and restored.)

2. a. *Education:* Graduation from an advanced education program in oral and maxillofacial surgery, periodontology or prosthodontics that is accredited by the Commission on Dental Accreditation of the ADA and Board certification in the area of specialty or a Fellow member of the American Academy of Implant Dentistry or a specialist who is an active member of the Academy of Osseointegration.

   b. *Experience:* At least five years of clinical practice in implant dentistry, including the advanced education program.

   c. *Cases:* Ten arches of implant treatment.

3. a. *Education:* Certificate from an advanced education program in oral and maxillofacial surgery, periodontology or prosthodontics that is accredited by the Commission on Dental Accreditation of the ADA.

   b. *Experience:* At least five years of clinical practice in implant dentistry, **not** including the time in the advanced education program.

   c. *Cases:* Ten arches of implant treatment.

4. a. *Education:* Education as a general dentist plus 500 continuing education hours in implant dentistry and 70 continuing education hours related to medical evaluations, pharmacology, physical diagnosis and/or sedation, and a certificate documenting one of the following: a two-year general practice residency program or Associate Fellowship in the AAID or certification by the American Board of General Dentistry or membership in the Academy of General Dentistry at the level of Fellowship or higher.

   b. *Experience:* At least six years of clinical practice in implant dentistry.

c. *Cases:* Ten arches of implant treatment.

5. a. *Education:* Faculty member of an ADA accredited dental education program and education as a general dentist plus 500 hours of continuing education hours in implant dentistry and 70 continuing education hours related to medical evaluations, pharmacology, physical diagnosis and/or sedation, or other educationally based dental credentials, including graduation from an advanced education program in an ADA-recognized specialty that does not interface with implant dentistry and is accredited by the ADA Commission on Dental Accreditation or an advanced degree such as Master of Science in Dentistry or Doctor of Philosophy degree in a biomedically related field.

b. *Experience:* At least six years of full-time or ten years of part-time teaching or clinical supervision in implant dentistry.

c. *Cases:* One hundred arches of implant treatment. Faculty must have been the primary provider of implant treatment of 50 arches in their area of practice plus supervision of 150 additional arches of treatment.

The ABOI/ID has had its certification program in effect since 1990. It currently has 243 certified diplomates. For the years 1996 through 2001, inclusive, the only years for which figures are retrievable within the time constraints for filing this *amicus* brief, 73 diplomates have been certified, for an approximate average of 10 per year. During this same period, 28 candidates failed the examination, for an average of 4 per year.

ABOI/ID diplomates have a First Amendment right to communicate these qualifications to prospective patients in a manner that is not false or misleading. Moreover, prospective patients have a corresponding right to unfettered access to such information. The Florida statute that requires any announcement of ABOI/ID diplomate status to be accompanied by the disclaimer that this certification is not

recognized as a BONA FIDE specialty accrediting organization by the State of Florida or the ADA constitutes officially mandated government misinformation and violates the First Amendment rights of the ABOI/ID diplomates and the public. Fla. Stat. § 466.0282(3).

ARGUMENT

Amicus fully agrees with petitioners that the scripted disclaimer required by the Florida statute, Fla. Stat. § 466.0282(3), to accompany an ABOI/ID diplomate's advertisement of certification goes far beyond the authority of a state to advance a legitimate government interest by regulating commercial speech in accordance with the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 576 (1980).

The immediate wrong inflicted by the statute upon a dentist like the petitioner, Dr. Borgner, who has obtained a diplomate certification by passing through a rigorous process of oral and written examinations, case review and the documentation of his education and experience, is that the statute compels characterizing this certification as bogus or not genuine. Webster's Ninth New Collegiate Dictionary (1986) defines BONA FIDE as: "1: made in good faith without fraud or deceit (a *bona fide* offer to buy a farm) 2: made with earnest intent: SINCERE 3: neither specious nor counterfeit: GENUINE *syn* see AUTHENTIC." The counterpart of something not being authentic is that it is not genuine or bogus. Clearly, that is the meaning the public will take if a dentist can be compelled to attach such a statement to the announcement of an earned certification.

Compelling a dentist to classify the announcement of a diplomate certification as not genuine or bogus is the practical equivalent of prohibiting such an announcement. Where First Amendment rights are concerned, the government cannot seek to accomplish indirectly what it is prohibited by the Constitution from doing directly. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990). Thus, *Central Hudson* teaches that the type of commercial speech

at issue here, if not false or misleading, may only be restricted if "the asserted governmental interest is substantial." If so, it must then be determined "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary." *Central Hudson*, 447 U.S. at 566. Stated otherwise, the issue in this case is whether the only manner in which the State of Florida can accomplish its stated interest in this matter is to compel an onerous disclaimer that amounts to the equivalent of a ban on announcements of ABOI/ID diplomate status.

Before the Eleventh Circuit the Florida Dental Board conceded that an announcement of ABOI/ID certification was only potentially misleading, thus requiring application of the latter three prongs of the *Central Hudson* test. Pet. App. 8a. The court below concluded that *Central Hudson*'s second prong was satisfied by Florida's "desire to regulate dentists' advertisements due to its interest in 'protecting its citizens from unqualified and incompetent health care professionals...'" and proceeded to the next two segments of the *Central Hudson* test. Pet. App. 9a.

In applying the third part of the test requiring the State to demonstrate that its required disclaimer advanced the State's interest in a direct and material way, the Eleventh Circuit recognized that this burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). The court below found evidence of such harm in telephone surveys proffered by the Florida Board. Specifically, the court found that the surveys showed that consumers would be misled into thinking that a dentist advertising ABOI/ID certification was recognized by the State. Pet. App. 10a, 13a.

The court does not explain how this alleged confusion of consumers relates to the court's underlying finding that the

second prong of the *Central Hudson* test is satisfied by "Florida's interest in protecting its citizens from unqualified and incompetent health care professionals...." Pet. App. 9a. The ABOI/ID certification admittedly is not a sham. Presumably, the Florida Board's licensing process assures the competency of the dentists it licenses, as no license other than that of a general dentist is required to perform any implant dentistry procedure or any other dental specialty procedure in Florida. Pet. App. 42a. Certification, whether by a recognized specialty board or pursuant to State standards, presumably recognizes only education and testing that indicates advanced learning and experience over and above the acceptable level of competency. Therefore, Florida's requirement that an ABOI/ID diplomate self-designate that this earned credential is not BONA FIDE does not relate to competence and creates more confusion than it resolves.

Moreover, the questions in the Florida Board telephone survey that the appellate court found to be "most persuasive" are fatally flawed. Pet. App. 11a. Survey respondents were asked their perceptions of dentists who advertised as specialists. This survey, conducted solely for the purposes of this litigation, did not impress the district court. The district court found that the report showed only that 500 individuals were interviewed about their perceptions of Florida's role in overseeing dentists who advertise (1) as being **specialists** in a particular area, (2) as being board-certified **specialists** in a particular area, or (3) as having **practices limited to** a certain area, the district court went on to hold:

> Although the report fails to set out the precise questions that were asked of the respondents, it appears that nearly two-thirds of the respondents said they believed that dentists who advertise as being board-certified specialists in a particular area have been certified directly by the State of Florida or certified by a national organization that is recognized by the State of Florida. In addition, the report indicates that approximately fifty-seven (57%) of the respondents said they believed that dentists who

> advertise as being specialists in a particular area or as having their practices limited to a certain area have been either directly or indirectly certified by the State of Florida. Again, while these results may be interesting, they do not convince this court that the State of Florida, through enactment of section 466.0282, targets a genuine threat of harm and/or furthers substantial state interests in a direct and effective manner.

Pet. App. 44a. While the district court's holding that this survey does not establish that Florida's statute addresses a threat of substantial harm or furthers a substantial state interest is telling, even more telling is the fact that the survey questions have no relationship to the statute's provisions vis-a-vis a non-specialist's announcement of a valid certification. The survey questions addressed perceptions about dentists who advertise as **specialists** or use the term **practice limited to** in their advertisements to connote specialty status. Fla. Stat. § 466.0282(1) clearly prohibits announcement as a "specialist" by any dentist not recognized as such by an ADA recognized specialty certification board. Fla. Stat. § 466.0282(2) clearly prohibits a dentist who does not meet its qualifications from using the term "practice limited to." The survey questions do not address what perceptions the respondents might have of a dentist who advertised ABOI/ID certification without using the terms "specialist" or "practice limited to." Therefore, they are not evidence that consumer confusion will result from a dentist advertising ABOI/ID certification who does not use the terms "specialist" or "practice limited to" in the advertisement.

An even more basic flaw in the court's reliance on the survey is the survey's complete failure to address the last prong of *Central Hudson*. No questions were posed that would have revealed the respondents' perceptions of the scripted disclaimer. No questions were directed at determining whether a less burdensome approach than having a dentist state that his or her certification was not BONA FIDE might satisfy the State of Florida's concerns.

Cf., Ibanez v. Florida Dep't of Business & Prof'l Regulation, 512 U.S. 136, 146 (1994).

The Eleventh Circuit also failed to consider the public's interest in receiving information about dentists who have pursued advanced education and training in implant dentistry. The corollary to the right of free speech is the public's right to receive and evaluate information. The public's unfettered right to legitimate information is particularly important in the area of choosing a health care professional. This Court has noted that in such a situation overly paternalistic concerns of the state must fall before the public's right to information that is factual and not misleading. In striking down restrictions on pharmacist price advertising in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1946), this Court observed that:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. (Emphasis added.)

Id. at 770. The Court's observations on price advertising are applicable to the situation here. The First Amendment right to health information does not stop at price. A person considering a choice of health care professionals has the right to factual information on education, experience and

training. This right suffers as much, if not more, from misinformation caused by an arbitrary government determination that the health provider must designate his or her qualifications as NOT RECOGNIZED AS BONA FIDE as from a statute that would prohibit the advertisement in its entirety.

Finally, it bears emphasizing that the State of Florida has prohibited ABOI/ID diplomates from communicating their qualifications to the public since 1996. Pet. Br. 3, 4. Unless the question of the propriety of scripted "NOT . . . BONA FIDE" disclaimers is addressed, the possibility of future litigation over alternative or substitute burdensome disclaimers, with the attendant delay in the exercise of the advertiser's and the public's First Amendment rights, will be ever present. These delays are contrary to the principle that "...any deprivation of constitutional rights calls for prompt rectification." *Watson v. City of Memphis*, 373 U.S. 526, 532-33 (1963). The all-encompassing, misleading scope of such scripted disclaimers is also contrary to the principle announced in *Edenfeld v. Fane*, 507 U.S. 761 (1995), where the petitioner was seeking the right enjoyed in other states to solicit accounting clients in Florida. Quoting from *NAACP v. Button*, 371 U.S. 415, 438 (1963), this Court said:

> 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'

Id. at 777. The broad and burdensome proscriptive disclaimer in this case should be struck, and the propriety of a state's authority to compel statements by requiring scripted disclaimers should be addressed.

CONCLUSION

Petitioners should be granted a writ of certiorari in this matter.

Respectfully submitted,

THOMAS H. BOERSCHINGER
Counsel of Record
ALAN O. AMOS & ASSOCIATES, P.C.
180 N. LaSalle Street
Suite 3150
Chicago, Illinois 60601
(312) 419-1300

Counsel for Amicus Curiae
American Board of Implantology/
Implant Dentistry

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IN THE
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THE FLORIDA BOARD OF DENTISTRY,
AND JOHN O. AGWUNOBI,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
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BRIEF OF AMICUS CURIAE, THE AMERICAN ACADEMY OF COSMETIC DENTISTRY, INC., IN SUPPORT OF THE PETITION

BRIAN D. WINTERS
Counsel of Record
DANIEL E. CONLEY
ROBERT J. PLUTA
Counsel for Amicus Curiae
The American Academy of
Cosmetic Dentistry, Inc.
Quarles & Brady, LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

10 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE FLORIDA STATUTE FUNCTIONS AS A DE FACTOR BAN AGAINST COMMUNICATING THE FACT THAT ONE HAS PROFESSIONAL CREDENTIALS UNLESS SUCH CREDENTIALS HAVE BEEN SANCTIONED BY THE STATE..... 3

II. THE STATE'S DE FACTO BAN AGAINST COMMUNICATING A NON-STATE-SANCTIONED CREDENTIAL HARMS CONSUMERS 5

III. EVEN REGULATIONS SHORT OF A BAN CANNOT BE JUSTIFIED HERE BECAUSE THE SPEECH IN QUESTION IS NOT "POTENTIALLY MISLEADING" 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Page:

44 Liquormart, Inc. v.Rhode Island
517 U.S. 484 (1996) 2

Ibanez v. Florida Department of
Business and Professional Regulation,
Board of Accounting, 512 U.S. 136 (1994) 6

Peel v. Attorney Registration and
Disciplinary commission of Illinois,
496 U.S. 91 (1990) 4,5

Other Authorities:

David Dranove, *The Economic Evaluation*
of American Health Care. (2000) 5

Alex Kozinski and Stuart Banner,
Who's Afraid of Commercial Speech,
76 Va.L. Rev. 627 (1990) 3

Phillip Nelson, *Advertising as Information,*
82 J. Pol. Econ. 729 (1974) 5

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, the American Academy of Cosmetic Dentistry, Inc. (AACD), is a professional organization of some 5,000 members dedicated to advancing the art and science of cosmetic dentistry and encouraging the highest standards of ethical conduct and responsible patient care among cosmetic dentists.

The AACD seeks to fulfill its mission by offering superior educational opportunities to practitioners; serving as a user-friendly forum for the creative exchange of knowledge and ideas; and providing accurate and useful information to the public and the profession. Among its educational activities, the AACD holds annual scientific sessions for its members and publishes "The Journal of Cosmetic Dentistry." Through its charitable trust, the AACD also engages in charitable activities. These include its "Give Back a Smile" program, which provides consultation and treatment free of charge to people who have sustained dental injuries as a result of domestic violence.

The AACD is also the largest dental organization that offers a certification in cosmetic dentistry. AACD members who have satisfied the requirements, a process that typically takes three to five years, are entitled to identify themselves as "Accredited Members." Approximately 225 AACD members have achieved such certification.

The process of achieving "Accredited Member" status has three parts. The first is a written examination that tests the candidate in foundational knowledge of cosmetic dentistry. This test is administered at the annual scientific session in the

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[1] Written consent to the filing of this brief has been obtained from all parties and filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

presence of a representative of a testing agency. The educational testing and measurement consultant is also responsible for grading the test and presenting the results to the AACD's Board of Governors.

The second part of the accreditation process requires clinical case submissions and reports covering five specific types of corrective dental treatment. To submit clinical cases a candidate must have passed the written examination; must have attended three required workshops at the annual scientific sessions; must have attended at least half of the annual scientific sessions since taking the written examination; and must have maintained continuous membership in good standing in the AACD during the entire process. A panel of five examiners judges each case anonymously. When all five clinical case reports have received a passing grade, the candidate may proceed with the third phase of the process.

The third and final phase of the accreditation process consists of an oral examination on the clinical case submissions.

Amicus Curiae has a substantial interest in supporting the petition for certiorari. As explained below, Amicus Curiae believes that professional certification programs, such as its own and the one sponsored by Petitioner The American Academy of Implant Dentistry (AAID), make an important contribution to consumer welfare. The Florida statute harms consumers because, as a practical matter, it puts an end to the certification of dentists in Florida by non-state sanctioned organizations. And, importantly, this injury to consumer welfare is accomplished by a *de facto* ban on certain kinds of speech. The Court has made it clear that speech is privileged under our Constitution: "[G]overnment may not suppress speech as easily as it may suppress conduct, and . . . speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996).

Amicus Curiae respectfully urges the Court to grant the petition for certiorari.

SUMMARY OF THE ARGUMENT

Amicus Curiae agrees with Petitioners and with various commentators that the Court should revisit the conceptual underpinnings of its "commercial free speech" jurisprudence. *See, e.g.*, Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990). This case provides a perfect opportunity for such a reexamination. At the very least, as Petitioners urge, "the time has come to provide additional guidance to the lower courts about the line between valid and invalid disclaimers as well as the requisite findings needed to sustain them." *Petition* at 27. Without such guidance, the statute at issue (and its potential imitators in other states and affecting other professions) put at risk the ability of legitimate organizations such as Petitioner AAID and Amicus Curiae to award professional credentials.

The credentials that such organizations make possible, and the communication of those credentials to consumers of professional services, play an important role in our economy. They provide an incentive for professionals to invest in expertise and they reduce the cost to consumers of searching for such expertise. As a consequence, the challenged statute not only violates the First Amendment, which violation is wrong in itself, but it also reduces consumer welfare. For these reasons, it should not be allowed to stand.

ARGUMENT

I. THE FLORIDA STATUTE FUNCTIONS AS A DE FACTO BAN ON COMMUNICATING THE FACT THAT ONE HAS PROFESSIONAL CREDENTIALS UNLESS SUCH CREDENTIALS HAVE BEEN SANCTIONED BY THE STATE.

A state may not ban the dissemination of accurate, factual information even if that information may be "potentially misleading" to some consumers. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 108 (1990). The Florida statute is unconstitutional because it amounts to a *de facto* ban on disseminating information that, at worst, may be "potentially misleading."

Under the statute, a dentist practicing in Florida who has satisfied Amicus's requirements for certification in cosmetic dentistry may not state that she has been so certified, unless "in capital letters or some other manner deemed distinguishable from the rest of the announcement," appears the following "disclaimer":

"THE AMERICAN ACADEMY OF COSMETIC DENTISTRY IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."

Common sense tells us that a rational professional will not go to the trouble of communicating that she has been certified by an organization if she is required to exclaim in the very next breath "BUT THE ORGANIZATION THAT CERTIFIED ME IS NOT RECOGNIZED AS BONA FIDE". If the certifying organization is not "bona fide," then what is it? Justice Stevens answered that question in *Peel*, not as a matter of law but as a matter of ordinary linguistic intuition, when he distinguished "certifying boards that are *bona fide* and those that are *bogus*." 496 U.S. at 109 (emphasis added).

Because it is not in the interest of any professional to communicate a credential from an organization that has been labeled "bogus", such communication simply will not take place. The practical (and expected) result of the statute will have been to *ban* the dissemination of accurate, factual information about professional credentials because, allegedly, that information may be "potentially misleading." Such a *de facto* ban on truthful speech should not be permitted.

II. THE STATE'S DE FACTO BAN AGAINST COMMUNICATING A NON-STATE-SANCTIONED CREDENTIAL HARMS CONSUMERS.

Consumers benefit when professionals invest time, effort and money to increase their expertise. Everything else being equal, more investment will take place—and the benefit to consumers will be greater—if professionals can reap a tangible economic benefit from their investments. To reap an economic benefit from her investment in expertise, a professional must be able to communicate to the market in an efficient, credible way that she has indeed made such an investment. Professional credentials provide such a means of communication[2]. By imposing a *de facto* ban on communicating non-state-sanctioned credentials, the Florida statute reduces the economic return on investments in expertise. Lower return on investments means less investment, and less investment in expertise makes consumers worse off.

The statute harms consumers in another way. Professional credentials reduce consumers' search costs by making it easier for them to distinguish among those who offer their services for sale. Consumer search costs can be especially high in markets such as dental care (and health care in general) where the characteristics of the product cannot be easily observed prior to purchase.[3] Even if a credential does not convey in itself all relevant information, it efficiently sets the stage for productive inquiry by the consumer:

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[2] In this respect, and others, professional credentials are similar to trademarks. Justice Stevens noted this resemblance in *Peel*. 496 U.S. at 102.

[3] Economists refer to such products as "experience" goods. *See generally*, Phillip Nelson, *Advertising as Information*, 82 J. Pol. Econ. 729 (1974). Scholars have recognized that health care in general is an experience good. *See, e.g.*, David Dranove, *The Economic Evaluation of American Health Care* 10 (2000) (stating that "medical care may be the quintessential experience good.")

Consumer (on phone): I see here in the Yellow Pages that Dr. Smith is accredited by the American Academy of Cosmetic Dentistry. What exactly does that mean?

Dentist's Office Manager: We can send you a brochure or, if you have internet access, go to www.aacd.com.

A statute, like the one at issue here, that bans, or even chills, the communication of legitimate professional credentials thus harms consumers in two ways: it raises their search costs and it reduces the investments professionals will make to acquire expertise.

III. EVEN REGULATIONS SHORT OF A DE FACTO BAN CANNOT BE JUSTIFIED BECAUSE THE SPEECH IN QUESTION IS NOT "POTENTIALLY MISLEADING."

Because the speech in question is not actually or inherently misleading, the state may not ban it. It should not matter whether the ban is express or, as here, *de facto*. While the state could "enact measures short of a total ban to prevent deception or confusion" if the speech were "potentially misleading," *Peel*, 496 U.S. at 116, the state cannot simply cite that fear to justify its attack on First Amendment rights. This Court has recognized that "[i]f the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accounting*, 512 U.S. 136, 146 (internal quotation marks and citations omitted).

The harm recited here is not even that dentists holding specialized credentials from non-state-sanctioned organizations will mistreat consumers. The alleged harm is "that consumers

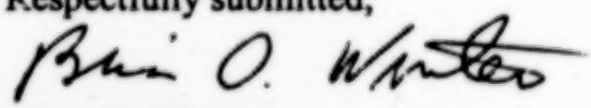
may be led into thinking that such a dentist enjoys state recognition and approval." Pet. App. 10a n.7. There are two problems with this. First, even if the possibility of such confusion could be demonstrated, Amicus Curiae agrees with Judge Wills that such "harm" is not constitutionally significant. Pet. App. 23a.

Second, the evidence is sparse that any such confusion is more than purely hypothetical. According to the trial court, the only "evidence" to support the constitutionality of a statute enacted in 1999 was a "very brief survey report" which was produced three years later and offered in this litigation at the eleventh hour. Because "the [survey] report fails to set out the precise questions that were asked of the respondents," Pet. App. 44a, one can only speculate as to whether the survey in fact documents a level of potential confusion sufficient to justify some form of regulation short of the state's *de facto* ban. It is hard to understand how, under such circumstances, the state can possibly have satisfied its burden.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Brian D. Winters
Counsel of Record
Daniel E. Conley
Robert J. Pluta
Counsel for Amicus Curiae
The American Academy of
Cosmetic Dentistry, Inc.
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

SUPREME COURT OF THE UNITED STATES

RICHARD A. BORGNER ET AL. *v.* FLORIDA BOARD OF DENTISTRY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02–165. Decided December 9, 2002

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE GINSBURG joins, dissenting from denial of certiorari.

This case presents an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech and to provide lower courts with guidance on the subject of state-mandated disclaimers. I would vote to grant the writ of certiorari.

I

Borgner is a Florida-licensed dentist who practices general dentistry with an emphasis on implants. In light of his specialty, Dr. Borgner advertises himself as a member of the American Academy of Implant Dentistry (AAID) a fellow of the AAID, and a Diplomate of the AAID's certifying board, the American Board of Oral Implantology/Implant Dentistry. The AAID is a national dental organization whose members may earn credentials in the field of implant dentistry. The organization's primary purpose is the enhancement of its members' knowledge, skill, and expertise in that field. Implant dentistry and organizations focusing on this specialty, however, are not recognized by the American Dental Association (ADA) or the Florida Board of Dentistry (Board).

The current version of §466.0282 of the Florida Statutes allows Florida-licensed dentists to advertise a specialty practice or accreditation by a bona fide certifying organization other than the ADA or the Board, but requires that

the advertisement disclose that the indicated specialty or certifying organization is not state approved. Thus, Dr. Borgner may advertise a "practice emphasis" in implant dentistry, but must include the following state-prescribed proviso in any such advertisement, be it a business card, yellow pages ad, or his letterhead:

> "'[IMPLANT DENTISTRY] IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.'" Fla. Stat. Ann. §466.0282(3) (2001).

Likewise, if Dr. Borgner wishes to "acknowledge or otherwise reference" his AAID credentials in the announcement, he must add a second disclaimer:

> "'[THE AMERICAN ACADEMY OF IMPLANT DENTISTRY] IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.'" *Ibid.*

Dr. Borgner brought an action challenging the statute on First Amendment grounds, and the District Court granted summary judgment in his favor. The Court of Appeals for the Eleventh Circuit reversed, applying the test of *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). *Borgner* v. *Brooks*, 284 F. 3d 1204 (2002). Noting that the speech in question concerns lawful activity and that the Board concedes that the speech is only potentially, not inherently, misleading, the court held that the State has a valid and substantial interest in regulating the dental profession, ensuring that consumers are not misled by ads, and protecting citizens from unqualified and incompetent dentists. The court also held that the State demonstrated, by introducing into evidence the results of two telephone surveys, that the harms it recites are real and that the restriction will in fact alleviate those harms to a material degree. Finally, the court found the disclaimer requirements to be no more extensive than necessary to protect citizens from unqualified and incompetent dentists, and to establish standards and uniform criteria for dentist certification.

II

Dr. Borgner seeks certiorari, making two compelling claims: that the decision below is inconsistent with our jurisprudence in this area and that the lower courts need guidance on the permissibility and scope of state-mandated disclaimers.

Specifically, Dr. Borgner, and the dissent below, raise serious questions about the validity of the surveys on which the Eleventh Circuit relied, and, hence, about their sufficiency for the purposes of the third prong of the *Central Hudson* test. Dr. Borgner also raises doubts about whether the Eleventh Circuit's conclusion is consistent with *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136 (1994), where, in holding that the respondent's decision censuring an attorney for advertising her accounting credentials violated the First Amendment, we relied on the absence of evidence of consumer confusion and on the fact that consumers were able to verify the petitioner's credentials.

Even if the problem that these surveys purport to identify exists, it is unclear whether forcing upon dentists a government-scripted disclaimer is an appropriate response. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), which upheld the requirement for a disclaimer in the context of advertising about contingency fees, is not very helpful to the Board. This is so because the advertisement in *Zauderer* was misleading as written and because the government did not mandate any particular form, let alone the exact words, of

the disclaimer.

Here, not only does the State force a specific disclaimer on Dr. Borgner, but the "detail required in the disclaimer . . . effectively rules out notation of the [AAID] designation on a business card or letterhead, or in a yellow pages listing." *Ibanez*, *supra*, at 146–147. If that is the case, the State may be unable to satisfy the fourth prong of *Central Hudson*, which requires that the regulation be no more extensive than necessary to serve the proffered governmental interest.

Another troubling aspect of this case is that the mandated disclaimer is likely to foster *more* confusion. As Judge Hill observed, a consumer, upon reading that AAID is "NOT" a "BONA FIDE" specialty, "may well conclude that the AAID is a bogus organization or diploma mill—neither of which conclusions is justified." 284 F. 3d, at 1219 (dissenting opinion). If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated.

Our decisions have not presumptively endorsed government-scripted disclaimers or sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest asserted. In my judgment, this case warrants review. Although disclaimers across industries and States are not likely to be exact replicas of one another, our resolution of this case can provide needed guidance on this important issue.

Accordingly, I respectfully dissent from the denial of certiorari.